THE

LAW REPORTS.

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Indian Appeals:

BEING

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

REPORTED BY HERBERT COWELL, ESQ.,
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

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LIST

OF THE

JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL

ESTABLISHED BY THE 3RD & 4TH WILL. IV. C. 41,

FOR HEARING AND REPORTING ON APPEALS TO HER MAJESTY IN COUNCIL.

1887.

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The Lord Chancellor, Lord *Halsbury*.
The Duke of *Richmond and Gordon*.
The Duke of *Buckingham*.
The Marquis of *Ripon*.
Earl *Granville*.
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Sir *Richard Baggallay*.
Sir *Richard Couch*.
Sir *Henry Cotton*.
Sir *Nathaniel Lindley*.
Sir *Charles Bowen*.
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And others ex-officio under the New Appellate Jurisdiction Act of 1887

BENGAL SECRETARIAT LIBRARY

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

PAGE

Ajudhia Pershad *v.* Sidh Gopal . 21
Abdool Hoosein Zenail Abadin *v.* Turner 111
Anangamanjari Chowdhrani *v.* Tripura Soondari Chowdhrani. 101

Babu Bindeshri Parshad *v.* Mahant Jairam Gir . . 173
Babu Sheo Lochun Singh *v.* Babu Saheb Singh . . . 63

Doulut Ram *v.* Mehr Chand . 187

Girishchunder Maiti *v.* Rani Anundmoyi Debi and Bhupendra Narain Roy 137

Krishna Kishori Chowdhrani *v.* Kishori Lal Roy . . . 71

Maharani of Burdwan *v.* Murtunjoy Singh 30
Maharani Inder Kumari *v.* Maharani Jaipal Kumari . . 1
Meenakshi Naidoo *v.* Subramaniya Sastri 160
Mussamat Amanat Bibi *v.* Luchman Pershad 18

PAGE

Musammat Rajeswari Kuar *v.* Rai Bal Krishan 142
Mylapore *v.* Yeo Kay . . 168

Pettachi Chettiar *v.* Sangili Veera Pandia Chinnathambiar . 84
Pirthi Pal Singh and Uman Pershad Singh *v.* Thakur Jewahir Singh 37

Rani Janki Kunwar *v.* Raja Ajit Singh 148

Simbhunath Panday *v.* Golab Singh 77
Southekul Krishna Row (In the Matter of) 154

Thakur Harihar Buksh *v.* Thakur Uman Pershad 7
Thayammal *v.* Venkatarama Aiyan 67

Uman Parshad *v.* Gandharp Singh 127

Waghela Rajsanji *v.* Shekh Masludin 89
Watson & Co. *v.* Sham Lal Mittar 178

LIST OF AUTHORITIES CITED.

	PAGE
Tagore Law Lectures, 1882, p 129	69
Dart's Vendors and Purchasers, ed. 1876, p. 1037	173

BENGAL SECRETARIAT LIBRARY.

TABLE OF CASES CITED.

A.

		PAGE
Ajonnissa Bibi *v.* Surjakant Acharji	2 B. L. R. 181	161
Anthony *v.* Dupont	Ind. L. R. 4 Mad. 217	161

B.

Barrett *v.* Hartley	L. R. 2 Eq. 794	19
Bhaishankar Narbhoram *v.* Harivallabh	1 Bomb. H. C. 20	190
Bhugwandeen Doobey *v.* Myna Baee	11 Moore's Ind. Ap. 487	63
Bissessur Lall Sahoo *v.* Maharajah Luchmessur Singh	L. R. 6 Ind. Ap. 233	190
Bykunt Nath Singh *v.* Maharajah Dheraj Mahtab Chund	17 S. W. R. 447	33

C.

Collector of Trichinopoly *v.* Lakkamani	L. R. 1 Ind. Ap. 282	91
Concha *v.* Concha	11 App. Cas. 541	14

D.

Deendyal *v.* Jugdeep Narain	L. R. 4 Ind. Ap. 247	78, 82, 190

E.

Eshenchunder Singh *v.* Shamachurn Bhutto	11 Moore's Ind. Ap. 7	168, 169

F.

Faez Bukah Chowdhry *v.* Fukeerooddeen Mahomed Ahassun Chowdhry	14 Moore's Ind. Ap. 234	128

G.

Ganesh Panday *v.* Dabi Dyal	5 Calc. L. R. 36	189
Girdhari Lall *v.* Kantoo Lall	L. R. 1 Ind. Ap. 321	79, 85, 189
Gouree Lall *v.* Joodhishter	25 Suth. W. R. 141	33, 36

H.

Hunoomanpershad Panday *v.* Musst Babooee Munraj Koonweree	6 Moore's Ind. Ap. 393	94, 182, 190
Hurdey Narain Sahoo *v.* Rooder Perkash Misser	L. R. 11 Ind. Ap. 26	79, 82

PAGE

I.

Isridut Koer v. Mussumat Hansbutti Koerain . . . . . L. R. 10 Ind. Ap. 150 63, 64, 65, 66

J.

Joynes v. Statham . . . 3 Atkyns, 388 . . 173

K.

Kedarnath Mahatah v. Kadumbinee Debea . . . . . 10 Suth. W. R. 239 . . 128
Kelly v. Solari . . . . 9 M. & W. 54 . . 19
Krishna Behari Roy v. Brojeswari Chowdhrani . . . . L. R. 2 Ind. Ap. 283 . . 14

L.

Ledgard v. Bull . . . L. R. 13 Ind. Ap. 134 160, 162, 167
Lindsay v. Linch . . . 2 Sch. & L. 9 . . 173
Looftonnisa Begum v. Kowur Ram Chunder . . . . . Beng. S. D. A. (1849) 371 33, 35
Lopez v. Muddun Mohun Thakoor . 13 Moore's Ind. Ap. 467 . 106

M.

Maharajah of Burdwan v. Srimati Tara Soondari Debia . . . . L. R. 10 Ind. Ap. 19 . 32, 33, 36
Montesquieu v. Sandys . . . 8 Ves. 302 . . 111, 125
Mungazee Chaprassee v. Sreemutty Shibo 21 S. W. R. 369 . 33, 36
Mussamut Bhoobun Moyee Debia v. Ram Kishore Acharj Chowdry . . 10 Moore's Ind. Ap. 279 67, 68, 70
Mussumat Bilasmoni Dasi v. Shepherd . I. L. R. 8 Calc. 664; L. R. 9 Ind. Ap. 33 . . 14
Mussumat Jariut ool Butool v. Mussumat Hosseinee . . . . 10 Moore's Ind. Ap. 196 . 5
Muttayan Chettiar v. Sangili Vira Pandia Chinnatambiar . . . . L. R. 9 Ind. Ap. 128 . . 86

N.

Nanomi Babuasin v. Modun Mohun . L. R. 13 Ind. Ap. 1 . 79, 82, 190

P.

Pettachi Chettiar v. Sangili Vira Pandia Chinnathambiar . . . . Ante, p. 84 . . . 190
Philips v. Philips . . . 3 Hare, 201 . . . 139
Pitam Singh v. Ujagur Singh . . I. L. R. 1 Allah. 652 . . 86
Priestly v. Fernie . . . 3 H. & C. 977 . . 182
Puddocoomaree Debee v. Juggut Kishore Acharjee . . . . I. L. R. 5 Calc. 615 . . 69
Pudmacoomari Debi v. Court of Wards . L. R. 8 Ind. Ap. 229 67, 68, 70

PAGE

R.

Rajah Amir Hassan Khan *v.* Sheo Baksh Singh	L. R. 11 Ind. Ap. 237	161
Ramchunder Chuckerbutty *v.* Brojonath Mozumdar	I. L. R. 4 Calc. 929	182
Ramphul Singh *v.* Deg Narain Singh	I. L. R. 8 Calc. 517	190
Ramsabuk Bose *v.* Monmohini Dossee	L. R. 2 Ind. Ap. 77	33, 36
Ramsbottom *v.* Gosden	1 V. & B. 168	173
Ramsoonder Singh *v.* Surbanee Dossee	22 S. W. R. 121	69
Ranee of Chillaree *v.* Government of India	L. R. Ind. Ap. Supp. Vol. 237	43
Rani Lokraj Kuar *v.* Baboo Mahpal Singh	L. R. 7 Ind. Ap. 63	128

S.

Sandback Charity Trustees *v.* North Staffordshire Railway Company	3 Q. B. D. 4	161
Sankar Dhobay, Ex parte	4 Beng. L. R. 65	161
Scott *v.* Jones	4 C. & F. 382	138, 139
Shetabdee Biswas *v.* Molamdee Mundul	25 S. W. R. 30	102
Shiro Kumari Debi *v.* Govind Shaw Tanti	I. L. R. 2 Calc. 418	103, 105
Sona Bebee *v.* Lall Chand Chowdhry	9 Suth. W. R. 242	33, 36
Sreemanchunder Dey *v.* Gopaulchunder Chuckerbutty	11 Moore's Ind. Ap. 28	128
Sri Raghunada *v.* Sri Broza Kishoro	L. R. 3 Ind. Ap. 154	68, 69
Suraj Bunsi Koer *v.* Sheo Pershad Singh	L. R. 6 Ind. Ap. 99	79, 189, 190

T.

Thomson *v.* Davenport	2 Sm. L. C. 397	182
Thukrain Sookraj Koowar *v.* Government	14 Moore Ind. Ap. 112	52

U.

Umbica Prosad Tewary *v.* Ram Sahay Lall	I. L. R. 8 Calc. 898	190
Upooroop Tewari *v.* Lalla Bandhjee Suhay	I. L. R. 6 Calc. 749	77, 81

V.

Venkateswara, In re	I. L. R. 10 Mad. 98	161
Viragava *v.* Ramalinga	I. L. R. 9 Mad. 148	68

W.

Waghela Rajsanji *v.* Shekh Masludin	Ante, p. 89	182
Widow of Shunkur Sahai *v.* Rajah Kashi Pershad	L. R. Ind. Ap. Supp. Vol. 220	43, 52
Williamson *v.* Naylor	3 Y. & C. (Ex.) 208	139

BENGAL SECRETARIAT LIBRARY

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

The East Indies.

MAHARANI INDER KUMARI . . . . DEFENDANT;

AND

MAHARANI JAIPAL KUMARI . . . . PLAINTIFF.

J. C
1886
Nov. 13.

ON APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.

Practice—Special Leave to appeal from Interlocutory Order—Stay of Execution.

Petition of special leave granted from an interlocutory order not appealable under the Code. Stay of execution refused, but an opinion intimated that pending the appeal the decree holder should not be put in possession of the large sums in dispute.

THIS was a petition by *Maharani Inder Kumari*, the senior widow of the late Maharajah *Sri Digbijai Singh* of *Bulrampore*, for special leave to appeal from an order of the Judicial Commissioner dated the 22nd of June, 1886, and from all orders passed subsequently thereto and in consequence thereof, and for an order that pending the hearing of the appeal execution of a decree of the Judicial Commissioner, dated the 27th of March, 1886, be stayed on the Petitioner giving sufficient security on her part for the due performance of the said decree, or that the execution might proceed upon adequate security being taken from the Plaintiff for due performance of any order Her Majesty might make.

* *Present*:—LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

J. C.
1886
MAHARANI INDER KUMARI v. MAHARANI JAIPAL KUMARI.

The litigation which resulted in the above-mentioned decree related to the estate of *Sri Digbijai Singh*, who died on the 27th of May, 1882, leaving two widows. The Petitioner was the senior widow, married in 1860; the Respondent, who was Plaintiff in the suit, was the junior widow, married in 1877. The questions in the litigation related to the construction of the Maharajah's will, and to how far the will was capable of operating in favour of the junior widow in consequence of its not having been registered under the *Oudh Estates Act* (I. of 1869).

The disputed clause of the will, as translated, was: "Should I leave no issue by my Khas Mahal, and in my lifetime find no opportunity to adopt, then in that case, without aliening immoveable assets, let the Maharani Sahiba after me during her lifetime be the owner of the entire riasat, and of the property moveable and immoveable." The question was whether the words "Maharani Sahiba" included both the widows or only the senior widow. The senior widow alone adopted a boy as son to the Maharajah, and both the lower Courts upheld the validity of the adoption, though they differed as to the construction of the will. Then there were further questions, whether the minor adopted son was entitled to the rents and profits of the estate subject to the legal rights of the widows, or whether the senior widow was entitled to a life estate during her life.

The District Judge on the 3rd of October, 1884, decided in favour of the Petitioner. He held that the adoption was valid; that the senior widow was entitled to the rents and profits of the estate; that the junior widow was entitled to an annuity of Rs.25,000.

The Judicial Commissioner on appeal remitted the case to try further issues, and at that time the Respondent petitioned in his Court complaining of waste and mismanagement of the estate by the senior widow and asking for a receiver, under sect. 503 of Act XIV. of 1882, to hold the estate *pendente lite* and to pay her the annuity. This petition was refused, but the senior widow, according to her petition, "felt constrained to pay the Respondent a sum of Rs.45,000 at the suggestion of the Judicial Commissioner, to be accounted for when the case was decided by Her Majesty in Council."

Ultimately the case came again before the Judicial Commissioner, who, on the 27th of March, 1886, reversed the decision of the District Judge on the construction of the will, and held that the words "Maharani Sahiba" included both the widows, and that they were entitled to the rents of the estate in equal shares as widows.

The following was the decree: "Upon the hearing of this appeal it is ordered and decreed that the Plaintiff's objection be decreed, and the decree of the District Judge of *Fyzabad* awarding the Plaintiff Rs.25,000 per annum be set aside, and that the appeal be decreed in part and judgment entered for the Plaintiff to the following effect, the rest of the suit being dismissed:

"The senior Maharani will retain the management of the estates.

"From their net profits she will be entitled to deduct year by year (*a.*) the amount at which the pay bills of the house establishment, charities, &c., stood during the last year of the Maharajah's life, their amount to be ascertained by inquiry in the executive department: (*b.*) such amount as after inquiry in the executive department may be found suitable for the maintenance and education of the minor. After these deductions are made the Plaintiff will recover from the senior Maharani Defendant a half share of the balance of the net profits of the estates; she will recover immediately whatever may be found to be due from the date of the Maharajah's death to the date of this decree, and thereafter she will be entitled to recover year by year, until such time as Government may see fit to comply with the wishes of the Maharajah expressed in the 5th part of his will, a half share of the balance of the net profits of the estate ascertained above, and the costs of this appeal, amounting to Rs.131,440."

The Petitioner appealed to Her Majesty in Council, and applied to the Judicial Commissioner on the ground that Respondent had no property whatever, for an order under sect. 608 of Act XIV. of 1882, either for a stay of execution pending the decision of Her Majesty in Council, or that the execution should proceed upon adequate security being furnished by the Respondent for the due performance of any order that might be made.

J. C.
1886
MAHARANI INDER KUMARI v. MAHARANI JAIPAL KUMARI.

On the 4th of June, 1886, the District Judge on the application of the Respondent ordered that the Petitioner should deposit on the 24th of June, Rs.62,153, the amount of costs payable to the Respondent out of the estate.

On the 22nd of June the Judicial Commissioner recorded his finding in reference to the aforesaid application of the Petitioner: "I am of opinion that it is proper that execution of the decree holders' costs amounting to about Rs.63,000 should be had unconditionally, and that execution of and up to 5 lakhs of rupees out of the total mesne profits decreed to the Plaintiff be also forthwith had unconditionally, and that execution of the rest of the decree be stayed until the decree holder lodges good and sufficient security for such remaining balance of the moneys decreed to her," and issued execution accordingly.

Then, on the 24th of June, the District Judge ordered, "I consider the Maharani Defendant has committed a contempt of this Court in not having paid in the costs which have been decreed by the Judicial Commissioner as payable to the Plaintiff decree holder, but as the Defendant has promised to pay in Rs.62,153 within four days, I take no further notice of her contempt. She is directed to pay in this sum by noon of the 29th of June"

"As to the payment of 5 lakhs, I am of opinion that it should not be deferred until the profits, expenses, etc., have been determined. That inquiry is likely to be a long one, if so, the direction to execute the decree forthwith, and unconditionally up to a sum of 5 lakhs, would be inoperative, the Maharani is given up to noon of the 25th of August, 1886, to pay into Court the sum of 5 lakhs. Should she fail in this payment, execution will be ordered under sects. 275 and 503 of Act XIV. of 1882." It was further ordered that the inquiry as to mesne profits be commenced from the 5th of July.

The Petitioner applied for leave to appeal from the Judicial Commissioner's order of the 22rd of June, which application was on the 16th of July refused.

On the 25th of August, a statement was filed by the Petitioner in the District Judge's Court shewing the net profits of the estate for the year in question to be Rs.285,525 only, and thereupon the District Judge ordered that that amount be paid into Court by your Petitioner by the noon of the 1st of September,

and the remainder of the 5 lakhs by the 25th of October. The amount so ordered to be paid on the 1st of September was paid in on that date over and above the two sums of Rs.45,000 and Rs.62,153. And thereupon it was ordered that the amount be placed in the Treasury, and notice thereof given to the Respondent's agent, who thereupon took the amount out of Court. The Judicial Commissioner confirmed this order on appeal except that although the balance of the 5 lakhs was to be paid into Court it was not to be paid to the creditor until the accounts had been settled.

Sir *Horace Davey*, Q.C. (*Doyne*, and *C. W. Arathoon* with him), for the Petitioner, contended that there was no evidence before the Judge as to what was the real value of the estates. If the decree is reversed the 5 lakhs will exceed anything that the Respondent could be entitled to; and it would be impossible to recover anything back from her, she being a person without means. It was an improper exercise of judicial discretion to order payment of so large a sum on account unconditionally and without taking any security for its repayment, if it should turn out not to have been justified. The order is unprecedented, and if allowed to be quoted as a precedent would give rise to a practice most detrimental to the interests of suitors. Reference was made to sect. 608 of Act XIV. of 1882; the object of which is to authorize the continuance of the *status quo*. If leave to appeal from the order of the 22nd of June be given, the effect will merely be that the Petitioner will not get back the Rs.285,000 which she has paid, but the balance of the 5 lakhs might be directed to remain in Court until the principal appeal is decided. Further than that, there is the question whether the adopted son has not rights paramount to either widow, and whether this money is not being paid away to his loss and detriment; which will probably be the subject of a further suit. An order of the kind made in *Mussumat Jariut ool Butool* v. *Mussumat Hosseinee* (1) would be suitable to this case.

Graham, Q.C. (*Mayne* and *Thomas* with him), for the Respondent, contended that the case in 10th *Moore* was quite distin-

(1) 10 Moore's Ind. App. Ca. 196.

J. C.
1886
MAHARANI INDER KUMARI v. MAHARANI JAIPAL KUMARI.

guishable from this. An application was then made to this tribunal, without any application to stay execution having been made to the lower Court. It was said that application ought to have been made to the lower Court, and some intimation of opinion was given. It does not appear what took place before the Judicial Commissioner on the 22nd of June. It could not have been, as represented, a mere matter of conjecture that the sum of 5 lakhs was fixed upon. It must have been in all probability founded on some material grounds before him. The annual profits of the estate were then stated to be 10 lakhs. The Judicial Commissioner must have had reasonable grounds before him to satisfy him as to what was in the hands of the Defendant. [LORD HOBHOUSE:—If he had merely ordered payment into Court, it would have been a different matter.] The sum alleged to be in the hands of the Defendant is 30 lakhs. The order asked by this petition ought not to be made without having before the tribunal an authentic account of the actual proceedings which took place on the 22nd of June. Then, as regards the petition that execution may be stayed until security is given by the Plaintiff, it is an unprecedented application. It has been refused by the lower Appellate Court. Whether that refusal is right or not, can only be determined in the form of an appeal. This is an interlocutory order passed by a Judge competent to pass it, and no appeal is given from it. The principal appeal has never been lodged, and possibly never may be, and at all events it is not yet before the Committee.

Sir *Horace Davey*, Q.C., replied.

LORD HOBHOUSE:—

Their Lordships are of opinion that the interlocutory orders which the petition complains of are such that their Lordships ought to advise Her Majesty to grant leave to appeal from them. It is not competent to their Lordships to make any order as to the stay of execution; but they think it right to say that to them it appears to be the reasonable course that the Plaintiff should not pending the appeal be put into possession of the large sums in dispute, and probably it is reasonable that she should not

receive more than the annuity of Rs.25,000 which was decreed to her by the first Court, and with that intimation of opinion they leave the Appellant at liberty to apply to the proper Court in *India* for the due security of all money paid into the Treasury in obedience to the decree of the Judicial Commissioner.

J. C.
1886
MAHARANI INDER KUMARI v. MAHARANI JAIPAL KUMARI.

Solicitors for Petitioner: *T. L. Wilson & Co.*
Solicitors for Respondent: *Watkins & Lattey.*

THAKUR HARIHAR BUKSH . . . . . PLAINTIFF;

AND

THAKUR UMAN PARSHAD . . . . . DEFENDANT.

J. C.*
1886
Dec. 10, 14.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Construction—Razinamah—Naslan-bad-naslan.

Where a razinamah provided that an estate should be divided into certain fractions the division to hold good for ever and to descend from generation to generation, naslan-bad-naslan, and its object appeared to be to set at rest disputes as to the absolute proprietary right therein:—

Held, that according to the true construction and intention of the instrument the shares were to be held in absolute ownership.

Concurrent findings as to the non-existence of an alleged custom will not be re-examined, unless it be shown that some principle of evidence had not been properly applied, or that the Courts had been led into error upon written documents.

APPEAL from a decree of the Judicial Commissioner (April 4, 1883) affirming a decree of the District Judge of *Sitapur* (Sept. 3, 1881), which dismissed the Appellant's suit.

The subject-matter of dispute was the share of a talook called *Sarora* in zillah *Sitapur*, which *Bissessur Buksh*, at and before his death, and his widow *Futteh* after his death respectively held, and of which after her death the Respondent obtained possession from the revenue authorities.

It was not disputed that if the share held by *Bissessur Buksh*

* *Present*:—LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

J. C.
1886
THAKUR HARIHAR BUKSH v. THAKUR UMAN PARSHAD.

was his absolutely, and was subject to the ordinary Hindu law of succession on the death of his widow without any issue of *Bissessur's* then surviving, the Respondent, who was the brother of the father of *Bissessur*, was the sole heir of that share in exclusion of the Plaintiff who was one degree further removed.

But the Plaintiff by his plaint contended that as he was the recognised talookdar of *Sarora* and held a sunnud as such from the Government of *India*, the whole interest of *Bissessur* on his death without issue, "according to law and also to a usage prevailing among the Panwar Rajputs, reverted to the Plaintiff, as sole heir of *Ganga Buksh*, deceased."

By his written statement he varied somewhat this part of his claim and alleged his right "by reversion as paramount owner."

And in the alternative he submitted that if under an agreement of the 4th of May, 1864, entered into between Plaintiff's father, *Ganga Buksh*, *Bissessur Buksh*, and the Respondent, it should be held that *Bissessur* took an absolute interest in the share held by him, he, the Plaintiff, was by custom prevailing among Panwar Rajputs and opposed to the ordinary Hindu law, entitled equally with the Defendant to *Bissessur's* share.

The Respondent, by his written statements in answer to the plaint, relied on a judgment and decree of the Financial Commissioner of *Oudh* of the 17th of June, 1867, passed in previous litigation to which *Ganga Buksh* and the Respondent were parties as a bar to the present suit, and also claimed as the sole next heir of *Bissessur Buksh* the share in suit, which the Respondent alleged to have been the absolute property of *Bissessur*, and to be governed as to succession by the ordinary Hindu law.

The agreement of the 4th of May, 1864, was as follows:—

"We are *Ganga Buksh*, talukdar, *Uman Parshad*, and *Bissessur Buksh*, parties to the suit respecting claim to taluka *Sarora*.

"Whereas for several years there has been going on among us a dispute about the proprietary right respecting taluka *Sarora*, and whereas now, at the time of the regular settlement, we have agreed that after coming to an amicable settlement we should set the whole dispute at rest, so that whatever ill feelings exist between relations, the descendants of a common grandfather, may be removed, therefore by mutual consent it is decided that the

whole estate be divided as follows, the division to hold good for ever and to descend from generation to generation, viz. :—

"*Ganga Buksh* ½ of the estate.

"*Bissessur Buksh* ¼ do.

"*Uman Parshad* ¼ do.

"And the entire estate, including *Pachchimgaon*, having been divided into four parts, four lists were drawn up, we *Bissessur Buksh* and *Uman Parshad* took up one each by consent of each other, and I, *Ganga Bakhsh*, took up the remaining two. There remains no longer any dispute about the division of the estate. We, *Bissessur Buksh* and *Uman Parshad*, shall pay to *Ganga Buksh* the present Government revenue until the assessment of the regular settlement jama, and I, *Ganga Buksh*, shall add on to it my half share of the jama and continue to pay it to Government. After the regular settlement the jama assessed on each village, whether it be more or less than the present amount, shall be paid by the party in possession in the manner above mentioned; but the above proportion (of payment) shall be maintained in respect to the villages held in common, *i.e.*, we *Bissessur Buksh* and *Uman Parshad*, shall pay half, and I, *Ganga Buksh*, the other half, and as there is a little difference in the quantity of land, it will be adjusted in the villages held in common, viz., *Kathwa*, *Ghazipur*, and *Himmat Nagar*. In addition to above we, *Uman Parshad* and *Bissessur Buksh*, shall pay to *Ganga Buksh*, talukdar, along with the instalment Rs.10 per cent., on account of talukdari right on the present Government revenue, or on such amount as may hereafter be assessed from time to time. Therefore this agreement is executed as a deed of compromise (razinama) that it may witness, dated the 4th of May, 1864."

BENGAL SECRETARIAT LIBRARY.

The judgment of the Judicial Commissioner, so far as it is material, was as follows :—

"In appeal it is urged that the decision of the 17th June, 1867, is no bar to the present suit, and as the grant was for maintenance the property should now revert to Plaintiff, the representative of the grantor. That the evidence sufficiently proved that even if the estate were *Bissessur Buksh's* absolute property the Plaintiff is by custom entitled to one-half.

J. C.
1886
THAKUR HARIHAR BUKSH v. THAKUR UMAN PARSHAD.

"For the Defendant it was contended that the District Judge, was wrong in holding that the arrangement of the 4th of May, 1864, gave the late *Bissessur Buksh* a single maintenance grant.

"With regard to *res judicata* it was argued that in 1867 the parties to the present suit were not at arm's length, they had both sued the widow of *Bissessur Buksh*, but they had not sued each other. The question then before the Court was simply the right of *Bissessur Buksh's* widow to hold the land. If the parties to the present suit had been co-Plaintiffs in 1866–67, the decision of the Financial Commissioner would not be binding as between themselves. The declaratory portion of the Financial Commissioner's decree was irrelevant. There is no identity as to cause of action.

"On the death of *Bissessur Buksh*, his uncle *Uman Parshad*, and his cousin *Ganga Buksh* each filed a claim. The old settlement procedure was to make the person in possession Defendant, and all the claimants Plaintiffs, and then to determine who had the best title. Following this practice the Assistant Settlement Officer made *Ganga Buksh* and *Uman Parshad* Plaintiffs, and the Defendants were vaguely described as, 'heirs of *Bissessur Buksh*,' Five issues were fixed, the first three refer to the dispute between the Plaintiffs and the Defendants, but the fourth and fifth referred to the rights of the Plaintiffs *inter se*. They were 4. 'If the Plaintiff's claim is proved has the Plaintiff *Uman Parshad* a prior title to the Plaintiff *Ganga Buksh* or not? *Onus* on *Uman Parshad*.'" '5. If not what are the respective shares of the Plaintiffs?'

"The Assistant Settlement Officer decreed the estate to the widow of *Bissessur Buksh* on certain conditions, one of which was that on her death 'the property shall pass to the Plaintiffs *Ganga Bukhsh* and *Uman Parshad* or their heirs in equal shares.' In appeal the Commissioner cancelled that portion of the Assistant Settlement Officer's order which directs that on the death of the widow the property shall pass to the Plaintiffs *Ganga Buksh* and *Uman Parshad* and their heirs in equal shares. On the death of the widow, it will be for the Court to decide the question of succession to the property.'

"There were three appeals preferred against the Commissioner's

decree, namely, *Ganga Buksh* v. *Mussammat Fateh Kunwar*, *Mussammat Fateh Kunwar* v. *Ganga Buksh* and *Uman Parshad*, and *Uman Pershad* v. *wife of Bissessur Buksh and Ganga Buksh*. These three appeals were heard together and disposed of by the Financial Commissioner on the 17th of June, 1867, when the following judgment was recorded:—

"'On the part of *Ganga Buksh* it is urged that as the words naslan-bad-naslan are entered in the ikrarnamah it ought to be held that the talookdar's relinquishment of rights enjoyed under the sanad can benefit only heirs of the body of *Bissessur Buksh* and not collaterals. The Financial Commissioner cannot admit this plea. It is plain that by executing the ikrarnamah and compounding for an allowance of 10 per cent. the talookdar relinquished all special right, and the common law of succession must take effect. The Financial Commissioner holds that the order of the Lower Court giving the widow a life interest in her husband's estate without power of transfer is correct. There is however a probability that the widow may be tempted to allow the property to be wasted, and it is necessary to make a declaratory order as to the parties with whom the reversionary rights lie. The decree of the Commissioner's Court is affirmed, and it is declared that after the death of *Bissessur Buksh's* widow his estate will be inherited by *Uman Parshad* and *Ganga Buksh* in such shares as may be legally due to them'

"It will be seen from the passages I have quoted that the question whether *Uman Parshad* had a better title to the estate of *Bissessur Buksh* than *Ganga Buksh* was directly and substantially in issue between *Ganga Buksh* and *Uman Parshad* in the former suit, that *Ganga Parshad* then urged that the grant should revert to the talookdar on failure of heirs of the body of *Bissessur Buksh*, and that the point was decided against him in the Court of the Financial Commissioner, which was a Court of competent jurisdiction. In this suit the Plaintiff claims on the ground that *Bissessur Buksh* having died without issue, the object for which the said grant or allotment was made has been attained, and the proprietary title in the said property reverts to the Plaintiff. This is precisely the point which was directly and substantially in issue in the former suit in the Court of the Financial Com-

J. C.
1886
THAKUR HARIHAR BUKSH v. THAKUR UMAN PARSHAD.

missioner between the Defendant *Uman Parshad* and *Ganga Buksh*, the father of the Plaintiff. The point was finally decided by the Financial Commissioner, and the District Judge has rightly decided that sect. 13, Act X. of 1877, as amended by sect. 6, Act XII. of 1879, was a bar to the rehearing of the claim.

"As we cannot go behind the Financial Commissioner's decree of the 17th of June, 1867, it is unnecessary to consider whether the District Judge's construction of the agreement of the 4th of May, 1864, is or is not correct.

"There remains the question whether the Plaintiff is entitled to half the property of the late *Bissessur Buksh*. The plaint is not very clear as regards custom. In par. 11 it is said that on the death of *Bissessur Buksh* without issue the proprietary right in the whole property 'according to law and also to a usage prevailing among the Panwar Rajputs reverted to the Plaintiff as sole heir of the said *Ganga Buksh*, deceased.' In the next paragraph it is said that if Hindu law be held to be against him, 'the Plaintiff claims to be entitled to one-half share in the said villages and lands by virtue of a custom prevailing among Panwar and other Rajput tribes, to the effect that on the death of the last representative of one branch of the family, so that such branch becomes extinct, the surviving branches of the said family, without regard to the nearness or degree of relationship, are entitled to the property left by the last representative of the extinct branch in equal shares.'

"The Plaintiff thus claims the whole of the estate according to 'a usage prevailing among the Panwar Rajputs and half the estate by virtue of a custom prevailing among Panwar and other Rajput tribes.' The evidence produced was to support the alleged custom by which surviving members divide the property of a deceased relation without regard to the nearness or degree of relationship. The counsel for the Plaintiff has not contended that any custom has been proved by which the Plaintiff as son of the deceased's first cousin would inherit the whole of the estate in preference to the uncle of the deceased. But the contention is that the uncle and the grandson of another uncle should inherit equally. Several instances were referred to by the Plaintiff's witnesses. There were some discrepancies in the depositions of

the different witnesses; but on the whole the evidence shews that in the instances referred to the property has gone to relations standing in different degrees of relationship to the late owner. The one principle common to all these cases is that each branch of the family obtained a share of the property of the person who died without issue, without reference to the degree of relationship. Thus on the death of *Aparbal Singh* without issue his property went to the descendants of his great uncle *Dhan Singh*. *Dhan Singh* had three sons, namely, *Sheo Buksh*, *Chain Singh*, and *Madari Singh*. On the death of *Aparbal Singh* there were alive one son of *Sheo Buksh*, two grandsons of *Chain Singh* and two grandsons of *Madari Singh*. The property was divided into three shares, one going to the son of *Sheo Buksh*, another to the grandsons of *Chain Singh* and a third to the descendants of *Madari Singh*. So when *Dina Singh* died half his property went to the son of his uncle, *Narain Singh*, and half to the grandsons and great grandsons of his uncle *Dhulip Singh*. This principle was followed by the Assistant Settlement Officer on the 1st of August, 1866, when he directed that on the death of the widow of *Bissessur Buksh* the property should pass in equal shares to *Ganga Buksh* and *Uman Parshad* or their heirs. But the decree of the Financial Commissioner left the question open. The same principle was followed by the Deputy Commissioner on the 31st of August, 1869, in the case of certain Panwar Thakurs, *Gya Parshad* v. *Dhaukal Singh*, and that decision was affirmed by the Financial Commissioner on the 20th of November, 1869. If the principle above referred to were to be followed in this case, the property of the late *Bissessur Buksh* would be divided between *Uman Parshad*, son of *Basti Singh*, and the descendants of *Balwant Singh*, son of *Basti Singh*. On the other hand no mention is made of this custom in the Settlement Records. No case has been deposed to in which the first cousin, or first cousin once removed, of a deceased person has shared with the uncle of the deceased person. And the Defendant's witnesses have deposed to cases in which the custom was not followed. On the death of *Gauri* the whole property went to *Hindu Singh*, the brother, although the sons of a second brother, *Mohrban Singh*, were alive. On the death of *Raghu Singh* the property went to

J. C.
1886
THAKUR HARIHAR BUKSH v. THAKUR UMAN PARSHAD.

the families of three cousins, but the family of *Ram Parshad*, a fourth cousin, got nothing. On the death of *Kushal* his brothers succeeded, excluding his nephew, the son of a deceased brother. Other examples might be mentioned, but these are sufficient to shew that there are exceptions to the custom relied on by the Plaintiff, and seeing also that the custom was not recorded in the settlement papers, I am of opinion that it cannot be held to be so certain and invariable that the Court would be justified in following it in preference to the ordinary law of succession. I must therefore confirm the decision of the District Judge that the Plaintiff has failed to prove the custom on which he relies. I can see my way to no other decision, and the result of this protracted litigation is that the property of *Basti Singh* will be divided equally between the families of his sons *Balwant Singh* and *Uman Parshad;* the Plaintiff, as representative of the elder son, being the talookdar, and *Uman Parshad*, the younger son, holding half the estate as under-proprietor, a result not altogether unsatisfactory."

Branson, for the Appellant, contended that the order of the Financial Commissioner of the 17th of June, 1867, was not an adjudication in a suit. It was in a revenue proceeding, for the purpose of ascertaining which of the claimants should be registered in the Court records as the party responsible for the Government revenue. No issue was raised as to the matter in issue in this suit. The decision, therefore, did not render the issue in this appeal *res judicata*: *Concha* v. *Concha* (1); *Krishna Behari Roy* v. *Brojeswari Chowdhrani* (2). As regards the razinamah of the 4th of May, 1864, it was an arrangement to provide maintenance for *Bissessur Buksh* and the Respondent. It was not on its true construction intended, nor did it operate to create or allow absolute interests in *Bissessur Buksh* or the Respondent. As regards the effect of naslan-bad-naslan, mokurruri istamrari, see *Mussumat Bilasmoni Dasi* v. *Shepherd* (3).

Doyne, and *Mayne*, for the Respondent, were not called on.

(1) 11 App. Cas. 541, 552.
(2) Law Rep. 2 Ind. App. 283.
(3) Ind. Law Rep. 8 Calc. 664; Law Rep. 9 Ind. App. 33.

1886. Dec. 14. The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

Their Lordships do not think it necessary to call upon counsel for the Respondent.

This case has been put before their Lordships by Mr. *Branson* with great fullness, and they consider that he has argued it with great lucidity and force, and said everything that is possible in favour of his client; but it is put before them in so clear and perspicuous a manner that they are able to deal with it on the opening.

There are two questions. The first is, how the agreement, the razinamah or compromise, of the 4th May, 1864, is to be construed; and if it is to be construed as giving an absolute interest to *Bissessur Buksh*, then the second question is, in what shares the inheritance is to be taken by his heirs?

To take the last question first, the Plaintiff alleges that by a certain custom prevalent among the Punwar Rajputs, if a branch of a family has become extinct the other branches take the estate in equal shares, which means in equal shares as between those branches, without regard to their being more or less remote in kinship to the deceased. That question was tried in the Courts below, and both Courts, the District Judge and the Judicial Commissioner, have come to the same conclusion upon it, adverse to the Plaintiff. Two lines of evidence appear to have been pursued, one consisting of instances of successions in kindred families, and the other of records of rights in wajib-ul-arzees. Upon the first line of evidence the Judicial Commissioner, who seems to have examined the case with care, has come to the conclusion that, balancing case against case, there is no certain invariable custom proved on this point. He also states, and the District Judge states, that the wajib-ul-arzees do not support the custom. In their Lordships' judgment the wajib-ul-arzees to which they have been referred seem to go further. A document appearing in the record is a specimen, and it states that brothers or nephews of the deceased are to succeed, regard being had to the nearness of kinship. That is a statement contrary to the statement in the plaint and to the custom which

J. C.
1886
THAKUR HARIHAR BURSH v. THAKUR UMAN PARSHAD.

the Plaintiff alleges. Therefore their Lordships have not considered it proper to go through the mass of oral evidence given in this case, because, if the Courts below concur in their conclusion upon such a matter as a family custom, their Lordships are very reluctant to disturb the judgment of those Courts. If there had been any principle of evidence not properly applied; if there had been written documents referred to on which the Appellant could shew that the Courts below had been led into error, their Lordships might re-examine the case; but in the absence of any such ground they decline to do so.

Then the question comes back to the construction of the razinamah, and that again is divided into two branches. The Courts below have found that the razinamah ought to be construed to give an absolute interest, because it has been decided that it should be so construed,—in fact that the matter is *res judicata*. Upon that point it is unnecessary for their Lordships to pronounce any opinion; but they wish it to be understood that they do not express any agreement with the Court below on this point, and it must be taken that, not having heard the argument on the other side, their minds are completely open upon it.

They rest their opinion upon the terms of the razinamah itself. After providing that the estate shall be divided into the fractions specified in it, the conclusion of the razinamah is that the division shall hold good for ever, and to descend from generation to generation—naslan-bad-naslan. Their Lordships have not been furnished with any authority, in fact Mr. *Branson* has fairly said he can find no authority, in which a gift with the words naslan-bad-naslan attached has been held to confer anything less than the absolute ownership. On the contrary, in the various cases in which the expressions mokurruri, istimrari, istimrari mokurruri, have been weighed and examined with a view to see whether an absolute interest was conferred or not, it seems to have been taken for certain that, if only the words naslan-bad-naslan had been added, there would be an end to the argument, because an absolute interest would have been clearly conferred. Their Lordships think that the insertion of those words in the razinamah would be conclusive in itself; but, looking at the expressed objects of the razinamah, they would come to the same conclusion

even if words of a less peremptory character had been used. It was for the purpose of settling a dispute which had been going on for several years about the proprietary right to the talook *Sarora*, and it was agreed that the whole dispute should be set at rest. The dispute was not as to maintenance; it was not as to a temporary interest; but it was as to the proprietary right. That is the dispute to be set at rest; and when their Lordships find that such a dispute is set at rest by a division of the estate to hold good for ever, and that not a word is introduced which of its own force imports less than an absolute ownership, they find it impossible to doubt that the true intention of the parties was to give to all alike the same amount of interest in the shares conceded to them, viz. that absolute ownership which each was claiming for himself in the whole or part of the property.

On those grounds their Lordships agree with the decision of the Courts below, though not for the same reasons, and the result is that the appeal will be dismissed.

Their Lordships will humbly advise Her Majesty in accordance with that opinion, and the Appellant must pay the costs of the appeal.

Solicitors for Appellant: *Watkins & Lattey.*
Solicitors for Respondent: *T. L. Wilson & Co.*

J. C.*
1886
Dec. 15.

MUSSAMAT AMANAT BIBI . . . . . PLAINTIFF;

AND

LUCHMAN PERSHAD AND NAROTAM DASS DEFENDANTS.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Act I. of 1877, *s.* 31—*Suit to reform a Deed—Mutual Mistake.*

Suit for reforming or altering a deed of mortgage dismissed, there being no reason to suppose that there was any fraud or deceit on the part of the Defendants, or that there was any mutual mistake of the parties as to the amount which was stated as the sum for which the security was given.

APPEAL by special leave from a decree of the Judicial Commissioner (March 10, 1881), affirming a decree of the District Court of *Fyzabad* (Aug. 5, 1880) which dismissed the Plaintiff's suit.

In his plaint the Appellant's deceased husband alleged that on the 16th of July, 1874, a decree had been passed against him in a suit brought by the *Land Mortgage Bank of India*, and that three other decrees had also been made against him by the same Court, one on the 14th of August, and two on the 28th of November, 1876, in suits in which the Respondent, *Babu Narotam Dass*, was Plaintiff; that the bank's decree had on the 18th of May, 1876, been purchased by the three Babus, *Lachman Pershad*, *Bisheshar Pershad*, and *Narotam Dass*, while in the course of execution, and that the sale of the property attached thereunder was fixed for the 18th of October, 1878; that on the 15th October, 1878, "having been deceived" by the three Babus, he executed, according to the accounts furnished by them without examining such accounts, a mortgage for Rs.4,37,276 12*a.* in lieu of the aforesaid decrees and of a debt due by the mortgagor to a banker named *Ram Kishen*.

He further alleged that the real amount of those four decrees and of the debt to *Ram Kishen* should have been stated in the mortgage deed of the 15th of October, 1878, as Rs.3,78,588 2*a.* 7*p.*, and not at Rs.4,37,276 12*a.*, and charged that the difference, amounting to Rs.58,688 9*a.* 5*p.*, was inserted in the mortgage "by reason of mistake and fraud," and he prayed the instrument

* *Present*:—LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

might be rectified by the correction of this error and for consequential relief.

The Plaintiff stated that the fraud and mistake in the accounts had been discovered on the 25th of January, 1879.

The Respondents filed their written statement, in which they maintained that there was neither fraud nor mistake in fixing the principal amount mentioned in the mortgage at Rs.4,37,276 12*a.*; and explained the mode in which that amount had been arrived at.

Upon these pleadings issues were framed, the first and main issue being, whether the mortgagor was bound by the mortgage deed of the 15th of October, 1878, stating the principal sum to be Rs.4,37,276 12*a.*, and whether he agreed to it or whether he was entitled to have the same rectified.

C. W. Arathoon, for the Appellant, contended that the consideration for the mortgage as expressed in the deed did not include any debts except those expressed therein; and that oral evidence was not admissible to contradict, vary, or add to the terms of the deed: See *Indian Evidence Act*, 1872, sects. 91, 92.

The oral evidence, if admissible, did not prove the Defendants' case. The mortgage deed ought therefore to be rectified (see Act I. of 1877, sect. 31), on the ground that the Appellant acted under a mistake of fact, and the Respondents by their conduct were responsible for and conduced to such mistake. Reference was made to *Barrett* v. *Hartley* (1); *Kelly* v. *Solari* (2).

Branson, for the Respondents, was not called upon.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

The question in this case is whether there are sufficient grounds made out by the Plaintiff for reforming or altering the deed of mortgage which was executed on the 15th of October, 1878. The Plaintiff in his plaint declares:—"That on the 15th October, 1878, *Fyzabad*, the present Plaintiff, having been deceived by the Defendants, executed, according to the accounts furnished by the Defendants, and without examining them, an instrument for Rs.437,376 12*a.* in lieu of the aforesaid decrees, and of the debt

(1) Law Rep. 2 Eq. 794. (2) 9 M. & W. 54.

J. C.
1886
MUSSAMAT AMANAT BIBI v. LUCHMAN PERSHAD.

due to *Ram Kishen Mahajan.*" Then he says that, looking to the actual accounts between the parties, "Rs.58,688 ought to be deducted from the mortgage money entered in the aforesaid instrument," and so on, and then that the cause of action accrued on the 25th of June, 1879, when he found out the mistake.

The Judge in giving judgment at the trial, says:—"The Plaintiff admits that previous to the execution of the mortgage deed an account was produced before him, and that *Uma Parshad*, his diwan, stated that a certain sum was due. *Mir Ghazafar Husain*, a well-known talukdar and a man of ability, had also been requested by the Plaintiff to examine the account, and the Plaintiff has deposed that he relied on him. A draft of the deed was prepared only after the accounts had been produced; and the Plaintiff says, moreover, that 'it was discussed for some fifteen days, and altered.'" In another part of his judgment he says:—"The Defendants have not produced clear proof that Plaintiff entered into a special agreement about interest, nor that he authorized them to include other debts in the mortgage deed, or to appropriate payments on account of decrees to the liquidation of other claims; but it is only reasonable to assume that when the Defendants were entering into such a heavy transaction with the Plaintiff, they would make a general settlement of their claims, and not leave small, or comparatively small, debts outstanding." It appears to their Lordships that, putting a correct construction upon the deed, and taking the evidence which was adduced, and the findings of the learned Judge, there is no reason to suppose that there was any fraud or deceit on the part of the Defendants, or that there was any mutual mistake of the parties as to the amount which was stated as the sum for which the security was to be given.

Under these circumstances, their Lordships are of opinion that the decision of the Judge who tried the case in the first instance, and the decree of the Judicial Commissioner who affirmed that decision, are correct, and they will, therefore, humbly advise Her Majesty that the judgment below be affirmed, and that the appeal be dismissed, the Appellant paying the costs of the appeal.

Solicitors for Appellant: *Barrow & Rogers.*
Solicitors for Respondents: *Watkins & Lattey.*

AJUDHIA PERSHAD AND ANOTHER . . PLAINTIFFS;

AND

SIDH GOPAL AND OTHERS . . . . . DEFENDANTS.

J. C.*
1886
Dec. 15, 16, 18.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Mortgage to Creditors—Evidence of Intention—Deed held to be inoperative unless all were bound.

A firm being in difficulties executed a mortgage to its creditors. Shortly afterwards some of the creditors named therein sued the firm and obtained decrees.

In a suit brought by other creditors named in the mortgage for sale of the mortgaged property to the extent of their rights, and to recover their debts as due to them thereunder from the Defendants personally:—

Held, that such suit must be dismissed. It appearing that the deed had never been acted upon, and that, notwithstanding that there was no stipulation to that effect, the intention and agreement were that the deed should not take effect unless all the creditors came in and were bound by it, the same could not be enforced.

SECRETARIAT LIBRARY.

CONSOLIDATED APPEAL from two decrees of the High Court (March 14, 1883), reversing a decree of the Subordinate Judge of *Cawnpore* (July 19, 1881), which decreed the Appellants' claim, and directed that the amount thereof should be realized from the mortgaged property and from the person and other property of the first four Defendants.

The mortgage deed on which the suit was based was dated the 22nd of June, 1875. The document at the outset stated that "a balance of Rs.30,700 is due by us on account, book accounts and hundis;" it then went on to name the several creditors, placing after the name of each the amount due to him.

The following is the material portion of the document:—

"And at the present time we cannot arrange to meet these liabilities. Therefore, in lieu of the Rs.30,700, due to the aforesaid mahajans, we mortgage to them collectively, three pucca masonry houses, together with the shop in which the business of

* *Present*:—LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

J. C.
1886
AJUDHIA PERSHAD v. SIDH GOPAL

Kanha Mal, Dwarka Das, is carried on in *Old Generalganj*, together with all its rights and appurtenances, dakhili and khariji, within the boundaries noted at foot, and which up to this present moment is in our proprietary possession, unencumbered by any sale, mortgage, or gift, and without any other shareholders therein. The following conditions and particulars have been mutually agreed upon between us, the mortgagors and mortgagees:—

"(1.) The mortgage consideration, as detailed above, shall be repaid by us to each of the said mahajans within three months, together with interest of ten annas per cent. per month, and the property shall be redeemed, and in this we shall raise no sort of excuses.

"(2.) That the interest due to each of the mahajans on any unpaid balance shall be paid to them monthly, and if we fail to pay any of the mahajans the entire or any part of the interest due to them, then, consequent on such failure, all the mahajans shall be at liberty to cancel the agreed term of three months, and on the basis of the failure to pay the interest, sue us for the principal and interest, and to recover the same from the person and property of us, the mortgagors, whether the said property be hypothecated or not, or be moveable or immoveable, and it may be recovered from our heirs also. To this neither we nor our heirs shall demur.

"(3.) That until the entire dues of the said mahajans be realized, we shall not mortgage, hypothecate, sell or give the mortgaged property to any one, and should we do so, it shall be invalid.

"(4.) That the said mahajans shall be at liberty, in order to realize the sums due to them, to sue for and recover the same from our persons and property, whether moveable or immoveable, either individually or collectively in a body, and to this we or our heirs shall not object."

Very soon after the execution of this document and on the 24th of June, 1875, *Debi Churn*, the twelfth creditor mentioned in the deed, filed his plaint against the Respondents, *Kanha Mal, Banarsi Das, Radhey Lal* and *Sidh Gopal* to recover the amount due by them upon a hundi, or bill of exchange, and obtained, on

the 11th of August, 1875, a decree for the amount claimed, with interest.

On the 17th of July, 1875, *Chaube Sidhari Lall* and *Baldeo Pershad*, the eighth creditors mentioned in the deed, filed their plaint against the same Defendants for the amount set against their names in the deed, with interest, and certain charges as money due on a hundi, and having denied that they were consenting parties to, or were at all aware of the deed, obtained on the 8th of September, 1875, a decree for the amount claimed with costs. Other suits were also brought against the same Defendants by other creditors, and decrees were obtained and execution taken out, and the rights of the said Respondents were sold in such execution, and were said to have been bought by the Respondent *Suodar Lal*, the son of the Respondent, *Kanha Mal*.

The claim of the Appellants not having been satisfied they, on the 27th of November, 1880, sued the five Respondents abovenamed, setting out the original debt, the execution of the said document of the 22nd of June, 1875, by the terms of which they contended that they were authorized to sue jointly or severally, and claiming that under that document their debt became due to them on the 22nd of August, 1875, and they prayed judgment to recover the principal and interest due to them "by enforcement of the mortgage lien against and auction sale of the mortgage property entered in the mortgage deed to the extent of the Plaintiffs' right, and also by holding liable the persons of the Defendants" and their other property.

The Subordinate Judge having decreed in the Appellants' favour the High Court in appeal dismissed the suit on the ground that the consideration upon the strength of which the houses were hypothecated was an actual or supposed promise of all the creditors mentioned in the deed to forbear from enforcing payment of their debts for a period of three months from the date thereof; that that condition was broken by the institution of suits by creditors whose names were in the document within the period of three months; and that thereupon the agreement came to an end, and the suit brought by the Appellants failed. They further added that the Appellants failed also on the ground that

J. C.
1886
AJUDHIA PERSHAD v. SIDH GOPAL.

they were not entitled to maintain their suit in respect of their separate debt, and in the absence of other parties interested under the deed as creditors.

Cowie, Q.C., and *C. W. Arathoon*, contended that the decree of the High Court was not warranted by the evidence. The actions by the two creditors were brought before the expiry of the three months allowed by the mortgage deed, and did not vitiate the contract or discharge the Respondents from their liability to the other creditors. The Appellants were entitled to sue on the deed, and by the 4th clause it was not necessary for them to join the remaining creditors.

Graham, Q.C., and *Branson*, for the Respondents, contended that there was no consideration for the mortgage deed, and that it was void and never took effect. It was intended by those who executed it that all the creditors should be bound by it and abide by it. Unless all the creditors concurred the arrangement fell through, it was dependent for its validity upon all consenting.

Reference was made to *Indian Contract Act* (IX. of 1872), sect. 25.

Arathoon, replied.

1886
Dec 18.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The Appellants in this appeal, who are the Plaintiffs in the suit, are bankers at *Cawnpore*. The Respondents are a joint Hindu family consisting of four brothers, the sons of *Dwarka Das*, and carried on business at *Cawnpore*, *Calcutta*, and *Lucknow*, the business at the different places being managed by some members of the family. It was a family business, apparently founded by *Dwarka Das*, the father; and the evidence was that the joint expenses of the family were paid out of the profits of the business. Indeed, on the argument of the appeal it was not disputed by the counsel for the Respondents that the members of the family would be bound by the deed upon which the suit was

brought if it were valid and binding in other respects. In June, 1875, the *Calcutta* firm of the Respondents stopped payment, and that brought the firm at *Cawnpore* into financial difficulties. Hundis had become due, and other hundis, for which the *Cawnpore* firm was liable, were becoming due. It appeared to be the object of the creditors of the *Cawnpore* firm to prevent a stoppage of payment, and, by giving time to that firm, to tide them over the difficulties in which they were placed. For that purpose it seems to have been arranged by some of the creditors that a meeting should take place to see what could be done.

The evidence with regard to this is as follows:—The first witness to which it is necessary to refer is *Kakai Mal*, who was one of the creditors. He said:—"Five or six days before the execution of the mortgage deed I had a conversation with *Ajudhia Pershad*"—that is the Appellant and Plaintiff in the suit—"at his house, to the effect that if all the creditors were willing a deed may be obtained from *Kanha Mal*"—the Defendant, who appeared to have the management of the business at *Cawnpore*—"regarding the property. *Kanha Mal* was then sent for. He said that though the hundis had not fallen due, yet he would pay half of the amount of the hundi which would fall due, and give a hundi for the other half. I and *Ajudhia Pershad* asked *Kanha Mal* to give a mortgage of his property for three months, and that we would settle with the creditors. I had made mention of my Rs.8000. It was agreed at the time that all the money due to me would be entered. When I came from *Lucknow* I then learnt that only Rs.300 of the amount due were entered. I got very much displeased with *Kanha Mal* for Rs.300 only being entered as due to me. *Kanha Mal* had asked me to obtain the consent of all the creditors, and that then he would execute a deed. He had told this to me and *Ajudhia Pershad*. Both of us had agreed to this, that we would obtain the consent of all the creditors." The next witness is *Madho Ram*, who was also a creditor. He said:—"The amount due to me was Rs.1500. I said that I was not agreeable"—that is with reference to their asking him to join in giving time.—"*Ajudhia Pershad*, *Purgn Chand*, and others, said that I should get my money included in the bond which was to be executed in favour of all persons.

J. C.
1886
AJUDHIA PERSHAD v. SIDH GOPAL.

Afterwards I said that I was agreeable to what all proposed. Afterwards *Kanha Mal* was asked to execute the deed. He said that as some were agreeable and some not, let the dates of the bills of exchange expire, and he would pay the money as each date expired. *Ajudhia Pershad* told him to execute the deed, and that he would obtain the consent of all."

Another witness was *Lalman*, who was the gomashta of *Kanha Mal*. He said:—"Five, six, or four days before execution of the deed, there was some conversation between *Ajudhia Pershad* and *Kanha Mal* at ten or eleven o'clock at the new house. The former told the latter to write an agreement to all his creditors that they would be paid in proportion to each one's share from the income of the *Benares* and *Lucknow* firms. *Kanha Mal* then replied that the amounts of expired dates would be paid first, and those of unexpired dates would be paid from time to time as their dates of payment expired. *Ajudhia Pershad* then said:—'This arrangement might lead some one to institute a suit whereby you will be put to a loss. I will make them understand that I will pay them proportionately when the money is received.' *Kanha Mal* answered that those who had amounts of expired dates still outstanding would hardly agree to this; whereupon *Ajudhia Pershad* said that he would make settlement with them all. *Kanha Mal* then said:—'If you take the responsibility upon yourself I will execute the agreement.' *Kanha Mal* then executed the agreement, and pledged his property therein."

Kanha Mal was also called as a witness, and after speaking as to the firms at *Cawnpore* and *Calcutta*, he said:—"Five or six days prior to the execution of the document the creditors began to make their demands. *Radhe Pershad*, *Puran Chand*, and *Parmeshri Das* made demands in respect of kutchá and pucca hundis. No other creditors made demands. The request made was to have the property made over to them, lest we should hereafter deny, as others had done, and that a suit should be brought, and a proportionate division of any moneys be paid. *Ajudhia Pershad* and others said that all would be settled up, and I asked how those were to be settled whose dates for payment had fallen due. The first day the conversation was held with me alone, and the next day *Behari Das* was also with me. *Ajudhia Pershad* said

that he had prevailed on all to take a proportionate share." Further on he made a statement to which the Subordinate Judge who tried the suit seems to have attached some importance. He said:—"There was no stipulation as to what would be the result if any creditor complained after the document had been written."

There was some evidence given on the part of the Plaintiff which was not altogether in agreement with that which has been read, but the Subordinate Judge took no notice of that evidence, and the High Court appears not to have thought it to be trustworthy. It is to be observed that the principal part of *Ajudhia Pershad's* debt was upon hundis which had not become due. He had, therefore, a strong interest in promoting an arrangement which would place him in the same position as the creditors whose hundis were due.

It is true that *Kanha Mal* made the statement that there was no stipulation, but the whole of the evidence shews that the parties from the first appeared to have contemplated that all the creditors would join; and it would not be necessary that there should be an express stipulation if, from the nature of the transaction, and their conduct, it is apparent that this was the understanding of the parties, and that they all acted upon the faith that all the creditors would join in the arrangement.

Upon that the deed which is the subject of the suit was executed. It is dated the 22nd of June, 1875, and is in these terms: "Hypothecation deed, dated 22nd June, 1875, executed by *Kanha Mal* and others. We, *Kanha Mal, Benarsi Das, Radhe Lal*, and *Sidh Gopal*, the sons of *Dwarka Das*, and proprietors of the firm known as that of *Dwarka Das, Kanha Mal*, in *Old Generalganj*, City *Cawnpore*, by caste *Khattri*, and residents of *Cawnpore*, do hereby declare that being sound in both body and mind we agree that a balance of Rs.30,700 is due by us on account book accounts and hundis to the following creditors." Here follow the names of all the creditors, with the sums due to them, as in a list given in by *Kanha Mal*, the whole amounting to Rs.30,700. Then it says: "And at the present time we cannot arrange to meet these liabilities. Therefore in lieu of the Rs.30,700 due to the aforesaid mahajans we mortgage to them collectively three pucca masonry houses, together with the shop

J. C.
1886
AJUDHIA PERSHAD v. SIDH GOPAL.

in which the business of *Kanha Mal, Dwarka Das*, is carried on in *Old Generalganj*, together with all its rights and appurtenances." Then follow some conditions and particulars which need not be read, one being a provision that *Ajudhia Pershad's* firm should collect the debts due to the firm and divide the money amongst the creditors.

Shortly after the mortgage was executed two of the creditors named in it, namely, *Sadhari Lal* and *Debi Charn*, brought suits against the Respondent's firm, and obtained decrees. It does not appear that from the time of the execution until the suit of the Appellants was brought anything was done under the deed, that any of the debts due to the firm were collected by *Ajudhia Pershad's* firm, and apparently the deed was not acted upon in any way.

The present suit was not brought until November, 1880. It was brought to enforce the claim of the Appellants under the mortgage. In their plaint they treated the deed as a mortgage to them for Rs.6600, the amount of their debt, and they prayed:—"A judgment to recover the Rs.6600, principal and interest, with costs of suit, by enforcement of the mortgage lien against, and auction sale of the mortgage property entered in the mortgage deed to the extent of the Plaintiff's right, and also by holding liable the persons of the Defendants, and the other property owned and held by them."

The Subordinate Judge made a decree in their favour to the effect of what was prayed for in the plaint.

Some questions have been raised upon the form of this decree, and the form of the suit being not upon the whole mortgage, and for the benefit of all the mortgagees and creditors, but for the benefit of the Appellants alone. It is not necessary for their Lordships to say anything upon those questions.

The main ground of defence in the case is that in consequence of the two creditors who brought their suits and obtained decrees not assenting to the deed, it cannot be enforced; that the intention and agreement were that the deed should not take effect unless all the creditors came in and were bound by it. Now it appears to their Lordships, upon the evidence in the case, that this was the intention of the parties, and that, although there

was no express stipulation to that effect, it is obvious from all that took place that this is what they meant, and is the agreement which was come to between them. The deed would not have been executed unless there had been that agreement. If the object of the arrangement is looked at, it would appear that this must have been their understanding. What all the parties desired was, that time should be given by the creditors to the *Cawnpore* firm in order that they might not be obliged to stop payment. If any creditor was at liberty to disregard the deed, and to bring a suit and obtain a decree, and get execution of it, he would be able to gain a preference over the other creditors, and in effect to oblige the *Cawnpore* firm to stop payment. It would be proper and right for them, if one creditor was endeavouring to obtain a preference over the others, to stop payment and to see that their property was equally divided amongst their creditors. In fact they did stop payment upon the suit being brought by the two dissentient creditors and the decrees obtained, and the effect was that the mortgage was not acted upon. Nobody appears to have sought to enforce it until this suit was brought; and the conclusion which their Lordships draw from the evidence is much strengthened by the conduct of the parties. The High Court, upon an appeal from the decision of the Subordinate Judge, were of the opinion here expressed, and accordingly they reversed his decree, and dismissed the suit. Their Lordships think that was the proper conclusion from the evidence which was given in the case, and that under the circumstances the mortgage did not take effect. They will therefore humbly advise Her Majesty to dismiss the appeal, and affirm the decree of the High Court, and the Appellant will pay the costs.

Solicitors for Appellants: *T. L. Wilson & Co.*
Solicitors for Respondents: *Watkins & Lattey.*

J. C.*
1886
Dec. 16, 17.
1887
Feb. 5.

MAHARANI OF BURDWAN . . . . DEFENDANT;

AND

MURTUNJOY SINGH AND OTHERS . . PLAINTIFFS AND DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Bengal Regulation VIII. of 1819, *sect.* 8, *para.* 2—*Service of Notice—Personal Service on Defaulter insufficient.*

Held, that under Regulation VIII. of 1819, sect. 8, para. 2, it is necessary for a sale thereunder that not merely the notice therein referred to should be stuck up at the Collector's and zemindar's kucherees, but that it must also be published in the required manner at the kucheree on the land of the defaulter, meaning on the land which it is sought to sell under the Regulation, or if he has no kucheree, then at the principal town or village on the said land.

Service on the defaulter personally is not sufficient.

APPEAL from a decree of the High Court (April 6, 1883) affirming a decree of the Subordinate Judge of zillah *Hooghley* (Dec. 31, 1881).

By those orders the suit brought to set aside the sale of lot *Amerpore*, a putni talook, was decreed, on the ground that the notice of sale was not served in accordance with the terms of Regulation VIII. of 1819.

The facts were as follows:—

The mehal of *Amerpore* is situate in zillah *Hooghly*, and is part of the zemindary property of the Appellant.

A putnee talook settlement thereof was made jointly with *Sri Narain Kur* (father of the Respondent *Radhalnullub Kur*) and *Iswar Chunder Kur* (the husband of the Plaintiff-Respondent, *Krishnakamini Dasi*), the name of *Sri Narain Kur* alone being registered in the zemindar's books as the proprietor of the talook.

After the death of *Sri Narain Kur* and *Iswar Chunder Kur*, the Plaintiff-Respondent, *Krishnakamini Dasi*, and the Respon-

Present:—LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

dent *Radhabullub Kur* became the joint owners of that talook, each being entitled to a moiety in joint possession of the whole.

To recover the arrears of rent (Rs.6475 14*a*. 11*p*.) for the half-year ending 1287 B.S. (which ended the 11th of April, 1881), the Appellant proceeded to cause the putni to be sold according to Regulation VIII. of 1819.

It was found that in compliance with the terms of sect. 8 of that Regulation the petition of the zemindar was duly stuck up in the Collector's kucheree, and a similar notice was also stuck up at the zemindar's own Sudder kucheree, but the following direction in that section was not fulfilled, "and a copy or extract of such part of the notice as may apply to the individual case shall be by him sent to be similarly published at the kucheree or at the principal town or village upon the land of the defaulter."

It was found that this notice was not taken to lot *Amerpore* and published there, but was taken to *Mahanud Dehi* kutcheree, where the defaulting putnidars resided, and then made over to *Radhabullub Kur*, who tore off a part, which he retained, and gave the remainder to the serving peon, and directed *Jodu Nath Bose*, the joint servant of the co-sharers, to give a receipt, which he did.

Upon this notice being so served, on the following day *Radhabullub Kur* appeared before the Collector by filing a petition in which he contended that the zemindar had charged too much interest on the amount of rent he claimed as due, and prayed that, "deducting the excess interest, take from me a deposit of the rest of the money."

And on the admission of the zemindar that the interest had been overstated, the Collector ordered the amount to be amended and the sale to proceed for such amended arrears; and the sale accordingly took place on the 13th of May, 1881.

The Subordinate Judge was of opinion that as there was a mal kucheree of the defaulter's upon the defaulting mehal, and as *Mahanud* is not included in lot *Amerpore*, nor is it a principal town or village in that lot, that, therefore, service of notice at *Mahanud* was not sufficient to satisfy the requirements of sect. 8, Regulation VIII. of 1819. He was further of opinion that the

J. C.
1886
MAHARANI OF BURDWAN v. MURTUNJOY SINGH.

peon did not duly publish the notice at some place exposed to public view.

The suit was therefore decreed, the sale was ordered to be set aside with costs against the Appellant, and it was ordered that the purchaser should recover his purchase-money.

The High Court, after referring to a Full Bench the question "whether the service of the notices was sufficient in point of law to satisfy the requirements of the Regulation," dismissed the appeal in accordance with the opinion expressed by the Full Bench (*Garth*, C.J., *R. C. Mitter*, *McDonell*, *Prinsep*, and *Tottenham*, JJ.).

That opinion was as follows:—

"We are of opinion that in this case the notice was insufficient.

"If there is a kucheree upon the land of the defaulting putnidar (by which expression we mean the land of the talook in question), we think that the notice must be published at that kucheree.

"If there is no such kucheree, the notice must be published at the principal town or village within the talook.

"We think, also, that the mere delivery of the notice to the putnidar or one of his amla is not sufficient; but that it must be *published* in the manner required by the section. The necessity for accurately conforming to the provisions of the Regulation is laid down authoritatively by the Judicial Committee in the case of *Maharajah of Burdwan* v. *Srimati Tara Soondari Debia* (1)."

Cowie, Q.C., and Sir *Horace Davey*, Q.C. (*Doyne* and *C. W. Arathoon* with them), for the Appellant, contended that in this case personal service on one of the defaulters, who was joint manager for both, and on the joint servant of both the defaulters, was sufficient to satisfy the Regulation. Besides, the defaulters were aware of the sale, and by their conduct and acts acquiesced in the sale proceedings, and were bound thereby. The only persons who could question the proceedings would be the durputnidars. The putnidar, under the circumstances, cannot avail himself of objections which might or might not lie in their

(1) Law Rep. 10 Ind. App. 19.

BENGAL SECRETARIAT LIBRARY

mouth. Reference was made to *Looftonissa Begum* v. *Kowur Ram Chunder* (1); *Sona Bebee* v. *Lall Chand Chowdhry* (2); *Ramsabuk Bose* v. *Monmohini Dossee* (3); *Maharajah of Burdwan* v. *Srimati Tarasoondari Debia* (4); *Mungazee Chaprassee* v. *Sreemutty Shibo* (5); *Gouree Lall* v. *Joodhishtir* (6); *Bykunt Nath Singh* v. *Maharajah Dheraj Mahtab Chund Bahadoor and Others* (7).

The Respondents did not appear.

1887
Feb. 5.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The only questions on which it is necessary for their Lordships to express any opinion in this case are, first, what is the true construction of the Regulation VIII. of 1819, sect. 8, par. 2; and, secondly, whether the Maharajah of *Burdwan*, who is the selling zemindar, has done what is necessary for a sale under that Regulation.

The material facts are not in dispute. The requisite petition and notice were stuck up at the Collector's kucheree, and the requisite notice at the zemindar's kucheree. The copy or extract which is next directed by the Regulation to be similarly published was not stuck up at the Plaintiff's kucheree at *Amerpore*, or anywhere else in *Amerpore*, which is the putni talook in question. Service of that notice was effected on *Radhabullub*, the Plaintiff's nephew and co-sharer in the talook, at her kucheree in *Mahanud*, about nine miles from *Amerpore*. The Plaintiff's *Mahanud* kucheree is in the same house with that of *Radhabullub*. It has been strongly urged at the bar that this service must be taken to be service on the Plaintiff herself; but their Lordships do not think it necessary to decide this matter, which, for the purposes of the judgment, they will assume in favour of the zemindar. Would such a service relieve him from giving notice on the lands at *Amerpore*?

The directions of the Regulation are, that a copy or extract of the notice which is stuck up at the zemindar's kucheree "shall

(1) Beng. S. D. A. (1849) 371.
(2) 9 Suth. W. R. 242.
(3) Law Rep. 2 Ind. App. 77.
(4) Law Rep. 10 Ind. App. 19.
(5) 21 Suth. W. R. 369.
(6) 25 Suth. W. R. 141.
(7) 17 Suth. W. R. 447.

J. C.
1887
MAHARANI OF BURDWAN v. MURTUNJOY SINGH.

be by him sent to be similarly published at the kucheree, or at the principal town or village on the land of the defaulter." It is argued that these terms do not require publication on the land of the defaulter, but that they are satisfied by publication at his kucheree, wherever it may be. And it must be allowed that the grammar of the sentence, taken alone, admits of such a construction.

The High Court have decided four points; first, that if there is a kucheree on the land of the defaulting putnidar, the notice must be published there; secondly, that by the land of the defaulter is meant that land which the zemindar is seeking to sell for default of rent; thirdly, that if there is no such kucheree, the notice must be published at the principal town or village on the land in question; and fourthly, that it must be published in the manner required, and that service on the putnidar is not sufficient. In all four of these propositions their Lordships agree.

To hold otherwise might defeat some of the substantial objects of this Regulation. It appears from the preamble that one of the objects is to establish "such provisions as have appeared calculated to protect the under-lessee from any collusion of his superior with the zemindar, or other, for his ruin, as well as to secure the just rights of the zemindar on the sale of any tenure." And immediately afterwards occurs the statement that it has been deemed indispensable to fix the process by which the said tenures are to be brought to sale. The object of directing local publication of notices is to warn the under lessees of the contemplated proceedings which may result in sweeping away their property, and also to act as advertisements to persons who may bid at the sale. Both these objects might, and in many cases would, be frustrated, if it were sufficient to publish notice at any kucheree which the putnidar may happen to possess, however distant it may be, or to serve it personally on the putnidar.

Moreover, the notice in question is described as "the notice required to be sent into the "mofussil." The word "mofussil" is doubtless opposed to the sudder kucheree of the zemindar. It may be used to signify the subordinate estate which is the subject of the proceedings, and in their Lordships' opinion it does point to that estate.

Then it is suggested that this suit is brought by the putnidar, and that an objection founded on the interests of the under lessees is not available to her. But that suggestion proceeds on a misconception of the nature and force of the objection. Their Lordships have to construe the Regulation. They find a process prescribed by it, which its framers thought it indispensable to fix, for the observance of which they have declared the zemindar to be exclusively answerable, and which is calculated to protect all persons interested in the estate against injury by the working of a very swift and summary remedy given to the zemindar. The zemindar has neglected to observe a substantial portion of that process. There is therefore material irregularity in his procedure, and of that irregularity the putnidar is entitled to avail herself as a "sufficient plea" within the meaning of the Regulation. Of course there may be cases in which one who might otherwise be entitled to avail himself of an irregularity has so conducted himself as to have waived or forfeited his right. But no such case is suggested here.

It remains to look at some decided cases which were cited as authority against the foregoing conclusions.

In the case of *Looftonissa Begum* v. *Kowur Ram Chunder* (1), the prescribed formalities had not been observed by the zemindar, and the sale by him was set aside. But in the course of their judgment the Sudder Dewanny Adawlut expressed an opinion that the kucheree of the defaulter may be any kucheree in which the collections of the tenure are made. Their Lordships however observe that the learned Judges do not cite the words of the regulation correctly. They appear to mix up the sentence which relates to the mode of publication with the next one, which relates to the evidence of it, two very distinct things. Moreover, they rely on the presence of the comma placed after the word "kucheree." Even if the punctuation were of the importance ascribed to it, it so happens that as the sentence is pointed the word "kucheree" may be applied to the whole expression "upon the land of defaulter," just as easily as to the last three words only. But their Lordships think that it is an error to rely on punctuation in construing Acts of the Legisla-

(1) S. D. A. (1849) 371.

J. C.
1887
MAHARANI OF BURDWAN v. MURTUNJOY SINGH.

ture. They find that the reasons given do not support the conclusion, from which they feel no difficulty in dissenting.

In the case of *Mungazee Chaprassee* v. *Sreemutty Shibo* (1) a Division Bench of the High Court decided, with much hesitation, that the regulation was satisfied by publication at a kucheree of the defaulter which, though not on the land to be sold, was on adjacent land, and was the office at which all the business of the estate to be sold was carried on. If that decision were right it would not govern this case, in which there has been no publication in the mofussil at all. Independently of that difference, the decision appears to have been rested on the *dictum* of the Sudder Dewanny Adawlut in 1849, and on the reason given for that dictum. But for the reasons above given their Lordships prefer the conclusion that the kucheree meant is one on the land to be sold, and that if there is none, as was the fact in the case under consideration, the publication should be in the principal village on that land preferably to a kucheree on other land. If there should be no village at all, an adjacent kucheree might be the proper place of publication, but no such case appears to have occurred.

The only case cited which is directly in favour of the contention in this case is that of *Gouree Lall* v. *Joodhishtir* (2), where it was decided that the Regulation was satisfied by service of notice at the house of the defaulter. But the authority of that decision is undermined by its being rested mainly on the case of *Sona Beebee* v. *Lall Chand Chowdhry* (3), and the recognition of that case by this Committee in 2 Ind. App. p. 77. The same case has been again recognised by this Committee in 10 Ind. App. p. 20, but it is no authority for the proposition for which it is cited. It has been above pointed out that the formalities which the zemindar has to observe, and the evidence by which that observance has to be proved, are two totally distinct things. All that Sir *Barnes Peacock* decided was that if the observance of the requisite formality was distinctly proved, it was not necessary to have the mode of proof which the Regulation directs. In the case in 10 Ind. App. this Committee found that the question

(1) 21 Suth. W. R. 369. (2) 25 Suth. W. R. 141.
(3) 9 Suth. W. R. 242.

J. C.
1887
MAHARANI OF BURDWAN v. MUKTUNJOY SINGH.

whether the requisite formality had been observed depended on conflicting evidence, but that the statutory mode of proof had clearly not been followed, and they held that the decision must go against the zemindar, whose business it was to follow the prescribed method. They did not differ from Sir *Barnes Peacock*, nor did they hold that the statutory proof was the only proof that could be given. Neither did Sir *Barnes Peacock* decide or intimate any opinion that one of the important formalities required as preliminary to a sale could be dispensed with. Mr. Justice *Glover* rests his decision wholly on that of Sir *Barnes Peacock*, and its recognition by this Committee. And their Lordships observe that Mr. Justice *Romesh Chunder Mitter*, who adds other reasoning, is a party to the judgment now appealed from, apparently without dissent.

The result is that their Lordships will humbly advise Her Majesty that this appeal should be dismissed, and the judgment of the High Court affirmed.

Solicitors for Appellant: *T. L. Wilson & Co.*

CENTRAL SECRETARIAT LIBRARY.

PIRTHI PAL SINGH AND UMAN PERSHAD SINGH (SONS OF HURDEO BUX, DECEASED) . . . . . PLAINTIFFS;

AND

THAKUR JEWAHIR SINGH AND OTHERS . DEFENDANTS.

J. C.*
1886
Dec. 8, 9, 10.
1887
Feb. 19.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

TWO APPEALS AND A CROSS APPEAL CONSOLIDATED.

Limitation—Partition—Account of Proceeds of Family Joint Estate—Oudh Rent Act (XIX. of 1868), *sect.* 83, *cl.* 15, *and sect.* 106.

Where a judgment of the Judicial Committee in 1879 declared that the Defendant to a suit brought in 1865 held the villages in suit in trust for the joint family to which he belonged, and as a joint family estate governed by the rules of the Mitakshara, and decreed that the Defendant do cause

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* *Present:*—LORD HOBHOUSE, LORD HERSCHELL, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

J. C.

1886

PIRTHI PAL SINGH v. THAKUR JEWAHIR SINGH.

the said villages and the proceeds thereof to be managed and dealt with and applied accordingly :—

Held, that the Courts below were precluded from holding in subsequent suits that such Defendant held the said villages as an integral impartible estate according to the rule of primogeniture without the said trust, or from declaring that the Plaintiff was entitled to have his share allotted on partition, to be held by him as sub-proprietor to the Defendant.

One of such subsequent suits brought in 1880, being by the said Plaintiff to determine the amount of wasilat, and to adjust accounts of the profits which had accrued during the pendency of the principal suit, to fix the extent of the share to which he was by agreement with some of his co-sharers entitled, for separate possession by partition of his shares of 113 villages and of all the property which had been acquired by Defendant with the profits of the joint estate and the joint property not included in the former suit, that Defendant should render accounts to the extent of the above-mentioned shares of the profits during his management and for payment :—

Held, (1) that such suit was not barred by limitation.

(2.) That the provisions of the *Oudh Rent Act* (XIX. of 1868), sect. 83, cl. 15, and sect. 106 might apply to the profits of the 113 villages of which the Plaintiff had been recorded as a shareholder, but could not apply to the rest of the joint estate whether moveable or immoveable.

(3.) That the provisions in the Civil Procedure Code applicable to mesne profits did not apply to a suit for partition, or for an account of the proceeds of family estate.

THE first appeal was from an order of the Judicial Commissioner (Sept. 12, 1882), affirming an order of the District Judge of *Sitapur* (Jan. 3, 1882).

The second appeal and cross appeal were from an order of the Judicial Commissioner in another suit (July 16, 1883), amending an order of the District Judge of *Sitapur* (Feb. 15, 1883).

The family in which this litigation occurred consisted of the sons and grandsons of three brothers, *Hawanchal Singh*, *Bhawani Singh*, and *Fateh Singh*. *Hurdeo Bux* was the son of the first named, and father of the Appellants. *Jewahir Singh* was the son of the second named. *Parbut Singh* and *Ganeshi Singh* were the sons of the third named.

The principal suit of which this litigation was the sequel was instituted in 1865, by *Hurdeo Bux* and his cousin *Parbut Singh* against the Respondent *Jewahir Singh*, the sunnud holding taloukdar of *Bassendih*, to recover their shares of the joint Hindu family property then consisting of 113 villages.

The Plaintiffs having been unsuccessful in the Indian Courts,

Hurdeo Bux alone appealed to Her Majesty in Council. On the 9th of June, 1877 (Law Rep. 4 Ind. App. 178), the cause was remanded to *India* for further consideration by an order of Her Majesty in Council. The final order of Her Majesty in Council on the hearing after the remand is dated the 22nd of March, 1879, made in conformity with the recommendation of the Judicial Committee dated the 1st of March, 1879, which is reported in Law Rep. 6 Ind. App. 161.

The facts of this case will be found fully set forth in those two decisions.

The agreements referred to in the judgment in Law Rep. 6 Ind. App. 161 and in the present report, were dated the 23rd of March, 1870, and the 5th of February, 1874. The effect of them, and especially of the earlier one, formed a material question in this appeal.

The first paragraph of the agreement of the 23rd of March, 1870, on which *Hurdeo Bux* relied in the present suits, as giving him a claim to a second one-third share of the talook (*i.e.*, the share which otherwise would, according to his contention, have devolved upon *Parbut Singh* and *Ganeshi Singh*), is as follows:—

"We, *Hurdeo Bux*, son of *Hawanchal Singh*, and *Parbut Singh*, and thakurain of *Jamayet Singh*, descendants of *Fateh Singh*, co-sharers of taluka *Basaidih*, situate in *Parganah* and *Tahsil* in the district *Sitapur*, do hereby declare that whereas since commencement of 1277 Fasli there has arisen a dispute regarding the estate between us and *Jewahir*, talookdar, and cases have been instituted in every Court. Of these cases one regarding right to two-thirds of the estate remains unfinished up to this time, and relief has not been granted us from any Court, we have now mutually agreed that we three persons should conjointly prefer an appeal to *England*, pay the costs thereof in proportion to our respective shares, and so not on any account neglect to conduct the said appeal; whoever separates himself from conducting it or refuses to pay the costs he will cease to have any concern with his share and lose his claim thereto, and the individual engaged in conducting the said appeal will be held to be permanent proprietor of the share of such person who will have no further share or right in the said appeal."

J. C.
1886
PIRTHI PAL SINGH v. THAKUR JEWAHIR SINGH.

The two following paragraphs related to a settlement of account to be taken between the parties to the agreement, in respect of the income of certain villages which the committee of talookdars had awarded them out of the talook of *Basai Dih* for maintenance, and the division of the rabbi crop for the year 1277 F.

Differences thereafter arose, and suits were instituted between *Hurdeo Bux* and *Parbut*, and the latter, ceasing to live with the former, joined himself with *Jewahir Singh*, with the result that the second of the agreements above referred to was executed, on the 5th of February, 1874, by *Parbut Singh*, and *Ganeshi Singh*, who had then attained majority, to *Jewahir Singh*, and was registered on the same day.

This agreement was made with reference to the appeal then pending, which *Hurdeo Bux* had preferred to Her Majesty, against the decree of the Commissioner's Court, of the 10th of June, 1872, and which appeal he had preferred on account of *Parbut* and *Ganeshi*, and their one-third share, as well as his own. By that agreement *Parbut* and *Ganeshi* withdrew from the appeal, and expressed their willingness to accept the maintenance awarded to them by the *British Indian Association* (*i.e.*, the talookdars' committee), and confirmed by General *Barrow* as a decree. They declared that their relinquishment was not for the benefit of *Hurdeo Bux*, but of *Jewahir*, who would take any further right that might in the suit be held to have belonged to them.

Immediately after the order of Her Majesty in Council, made in accordance with the judgment of the 1st of March, 1879, reached *India*, *Hurdeo* applied for execution thereof. Eventually the Judicial Commissioner, on the 11th of November, 1879, ordered that proclamation be made, by beat of drum, in each of the 113 villages forming the subject of the suit, to the effect that these were the estate of a joint, undivided Hindu family, in which *Thakur Hurdeo Bux* had a member's rights; and which was held by *Thakur Jewahir Singh* in trust for the joint family; and that *Thakur Jewahir Singh* be enjoined, in the words of the decree, that he do cause and allow the said villages, and the proceeds thereof, to be managed and dealt with and applied accordingly; failing which he would be liable to be proceeded against under sect. 260 of Act X. of 1877.

Thereupon *Hurdeo Bux*, on the 2nd of June, 1880, applied under Act XVII. of 1876, entitled the *Oudh Land Revenue Act*, 1876, ss. 57 and 58, to have his name entered as a co-sharer of *Basai Dih* talook, in the register which the Deputy Commissioner of each district is, by the 56th section of the Act, directed to keep.

On the 4th of June, 1880, the Deputy Commissioner ordered accordingly, and his order was affirmed on appeal.

Eventually the Judicial Commissioner held that *Hurdeo Bux* could not obtain an account from *Jewahir Singh* of the rents and profits of the talook from the commencement of the litigation, but for that purpose must proceed by suit. In consequence *Hurdeo Bux*, on the 14th of December, 1880, instituted the first of the present suits, making only *Jewahir Singh* Defendant. He prayed as follows:—

"(*a.*). That it be declared that the bazdawa (petition of withdrawal of suit) dated the 5th of February, 1874, executed by *Parbut Singh* and *Ganeshi Singh*, in *Jewahir Singh's* favour, is invalid and of no effect, as against the previous agreement of the 23rd of March, 1870, executed in Plaintiff's favour; and that Plaintiff is entitled, as against *Jewahir Singh*, to recover *Parbut Singh* and *Ganeshi Singh's* share, in addition to his own, viz., that Plaintiff, *Hurdeo Bux Singh*, is also entitled to the second third share of all the property, which, on the 28th of August, 1865, consisted of 113 villages, as a joint and undivided family property.

"(*b.*) That the aforesaid Plaintiff be declared entitled to two-thirds share in all the property which has been acquired, with the profits of the joint and undivided estate, by *Jewahir Singh* (Defendant), trustee, and is now in his possession, and the joint and undivided property not included in the former suit, a list of all of which is attached to the plaint.

"(*c.*) That the Plaintiff be put in separate possession, by partition, of both kinds of estate, to the extent of the aforesaid shares, and be declared entitled to have his share in the villages partitioned through the Revenue Courts.

"(*d.*) That, to the extent of the above-mentioned shares, the Defendant be ordered to render accounts of the mesne profits

J. C.
1886
PIRTHI PAL SINGH v. THAKUR JEWAHIR SINGH.

during his management, and also from the 28th of August, 1865, up to the present date, and to the date of partition in future, and to pay all the money that may be found due, after deduction of all proper charges and costs of purchasing estates, &c., with the exception of so much profits of the third share of the 113 villages for which Plaintiff's name has been entered in the Revenue Records, and for which he can seek his remedy from the Rent Court, since 1288 F.

The reference in the plaint was to the *Oudh Rent Act* (Act XIX. of 1868), by the 83rd section of which (clause 15), exclusive jurisdiction is given to the Courts of Revenue in *Oudh*, over suits by a sharer against a lumberdar, or co-sharer, for share of the profits of an estate or any part thereof, or for the rendering and settlement of accounts in respect of such profits," and by the 106th section it is enacted that "suits for the recovery of a share of profits shall be instituted within three years from the date on which the share of profit claimed shall have become due."

On the 14th of February, 1881, and the 21st of March, 1881, orders were made by the Judge directing *Parbut Singh* and *Ganeshi Singh* to be made parties Defendant, together with certain other persons, *Sitaram*, *Dabi Dyal*, and others, whom the Plaintiff, *Hurdeo Bux*, by a separate list appended to his plaint, had alleged to be holding certain other villages "benami" for *Jewahir Singh*.

This was accordingly done, and the Plaintiff filed an amended plaint, to which these new parties were made Defendants.

Parbut Singh and *Ganeshi Singh* filed a joint written statement, by which they asserted their own rights to a one-third share, and contested the claim of both *Hurdeo Bux* and *Jewahir Singh* to that share.

The other additional Defendants did not file any written statement, and were, as well as *Parbut Singh* and *Ganeshi Singh*, considered by the Judicial Commissioner to have been unnecessarily made parties to the suit.

While these proceedings were taking place in the first suit, *Jewahir Singh*, on the 4th of August, 1881, instituted, in the same Court, the second of these suits, against *Hurdeo Bux*, by

which he sought a declaratory decree as to the extent of *Hurdeo's* share in 113 villages, and also as to the impartibility of the said property in his (*Jewahir's*) hands.

By his plaint he contended, that though *Hurdeo* was, under the Order of Her Majesty, entitled to an account of his share of the profits thereof, he was not entitled to a partition, the talook being, under the joint operation of Act I. of 1869, the sanads, and the grant, "entire and indivisible, according to the rule of primogeniture;" and that *Hurdeo* was merely entitled to a beneficial interest in the said property, and to an account of his share of the profits, but not to partition; and also that as to certain of the 113 villages in suit, which were specified in the 3rd schedule of the plaint, the same had been acquired by *Jewahir* and his father, by their own personal exertions and good management, and that he, *Jewahir*, was consequently, under Hindu law, entitled to a double share in respect of them.

On the 3rd of January, 1882, the Judge dismissed *Hurdeo Bux's* suit, *i.e.*, the first suit.

The Judge held, firstly, that *Hurdeo Bux's* suit was not barred by limitation, so far as regarded "the profits of the estate equivalent to his share." With reference to the issue as to partibility, the Judge held that *Hurdeo Bux* was not entitled to partition, and that the estate was not partible having regard to the *Oudh Estates Act*, 1869, and to the sanad, as also to the previous judgments of their Lordships of the Judicial Committee, as well in the appeals between these parties, as also in the appeals of the *Widow of Shunker Sahai* v. *Rajah Kashi Pershad* (1) and of the *Ranee of Chillaree* v. *Government of India* (2).

As to the claim for mesne profits, the Judge observed that the plaint of *Hurdeo Bux*, filed in 1865, had omitted to claim them, and that since the passing of Act XIX. of 1868, jurisdiction over suits by co-sharers to recover their share of mesne profits belonged to the Revenue Courts alone, and that there the Plaintiff should prefer his suit. As to *Hurdeo's* claim to the one-third share which had belonged to *Parbut* and *Ganeshi*, the Judge observed that it was not shewn in this suit that *Parbut* and *Ganeshi* were entitled to that share, and that it had not been so

(1) Law Rep. Ind. App. Supp. Vol. p. 220. (2) Ibid. 237.

J. C.
1886
PIRTHI PAL SINGH v. THAKUR JEWAHIR SINGH.

decided by the Judicial Committee; and that the nature of the assignment of their interest, which *Hurdeo* relied on, was ambiguous, and the agreement was revocable as being without consideration, and *Parbut's* refusal subsequently to appeal, not being calculated to prejudice *Hurdeo's* rights, and that it could not operate as a conveyance so as to give *Hurdeo* the right to recover possession under it; and that as to *Ganeshi Singh*, his mother, who was admitted not to have been at the time his legal guardian, had no authority to deal with her infant son's interest as she pleased.

The judgment concluded with the following findings:—

1. That the suit is not barred.

2. That the Plaintiff is a member of the family, and joint in interest; and that separation in residence does not necessarily destroy the joint interest in the property existing in a joint and undivided Hindu family.

"3. That the estate is not partible under the sanad and statute, and that the Plaintiff cannot claim partition of the moveable or immoveable property of the estate; but that the Plaintiff is entitled to the beneficiary interest in the entire estate, to the extent of one-third share of the profits, in the terms of the Privy Council decision dated the 1st of March, 1879.

"4. That the Plaintiff is a co-sharer, and the Defendant *Jewahir Singh* is, in respect of the Plaintiff, the lambardar answerable to the Plaintiff for the share, and to the extent of the share, in the profits of the estate decreed by the Privy Council.

"5. That the Civil Courts have no jurisdiction in awarding and decreeing either profits or mesne profits between co-sharers and lambardars who are in the position of trustees, and that such claims must be preferred to the Rent Court, under paragraph 15, clause D., sect. 83, Act XIX. of 1868.

"6. The Defendant, *Parbut Singh*, has no right to a definite portion of the estate. The agreement, purporting to convey one-third share in the estate to the Plaintiff, is therefore invalid. Moreover, the agreement is otherwise invalid and unenforceable by law. No claim can be founded upon such an agreement as is set forth in the plaint."

The Judicial Commissioner dismissed *Hurdeo Bux's* appeal from this judgment on the 12th of September, 1882.

The following is the material part of his judgment.

"The greatest part of the Plaintiff's claim is based on the agreement of the 23rd of March, 1870. It will therefore be convenient, in the first place, to consider that document. It is in three parts. The first part refers to an appeal to Her Majesty in Council; the second, to a settlement of accounts of the villages in the possession of the parties; and the third relates to the division of the produce of the rabbi crop of 1277 Fasli. It is on the first part only that the Plaintiff bases his present claim.

"This document purports to be an agreement between persons who, according to the Plaintiff's case, were members of a joint undivided Hindu family. But members of such a family have no definite shares; and it is not easy to see how the arrangement could have been carried out. But the Plaintiff has not sued for the specific performance of this agreement. On the strength of it he has sued to recover property in the possession of a third party, as if it were a conveyance. Now, it clearly was not a conveyance—it transferred no property. It was simply an agreement, with an extravagant penalty; and the District Judge has rightly held that it cannot be enforced. The only remedy the Plaintiff had for a breach of the agreement was to sue for damages.

"I agree with the District Judge that the Plaintiff has not, by the agreement of the 23rd of March, 1870, acquired a right to the shares of *Parbut Singh* and *Ganeshi Singh*, whatever they may be. And as the Plaintiff is not entitled to those shares, it is unnecessary to consider what interest *Parbut Singh* and *Ganeshi Singh* may have in the estate.

"The next point to be considered is, whether the Plaintiff is still a member of a joint undivided Hindu family . . . .

"It was held, by their Lordships of the Privy Council, on the 1st of March, 1879, that at the commencement of the suit, that is, in 1865, *Hurdeo Bux*, as far as the 113 villages then in dispute were concerned, was entitled to the rights of a member of a joint Hindu family. It is not even alleged that a partition of the family estate has since been made, and, had *Hurdeo Bux* claimed

J. C.
1886
PIRTHI PAL SINGH v. THAKUR JEWAHIR SINGH.

his rights and privileges, as a member of a joint and undivided Hindu family, I am inclined to think he must have gained his cause. But *Hurdeo Bux* has adopted another course. He has apparently made no attempt to enforce his rights as a member of a joint Hindu family. Assuming his share to be a definite one of one-third, he has had his name entered in the Revenue Registers as a sharer owning one-third of the 113 villages, the subject of the former suit. He lays no claim to those villages, or any part of them, in this suit, but sues for a share in certain villages, and moveable property, which he alleges have been since acquired from the profits of the joint estate; and also for an account of profits. He has therefore been acting in two different characters. As a co-sharer, owning a one-third of the estate, he has had his name entered in the Revenue Registers. As a member of a joint undivided Hindu family he brings this suit. This double character is very apparent in his claim regarding profits. He does not sue for so much of the profits of the 113 villages as he can sue for in the Rent Courts as a co-sharer, but, as member of the joint Hindu family, he claims so much of the profits of those 113 villages as the Rent Courts, under the law of limitation (Act XIX. of 1868, sect. 106), would be unable to decree to him as a co-sharer.

"It appears to me that the two characters are opposed. If the Plaintiff is a co-sharer, owning the definite share of one-third, he cannot at the same time be a member of a joint undivided Hindu family. The Plaintiff has acted as a co-sharer, and his own action shews that he has ceased to be a member of the joint undivided Hindu family.

"It remains to be considered whether, as a late member of the joint Hindu family, he can sue for more than he has already got, namely, the one-third of the 113 villages.

"It was urged, for the Plaintiff, that their Lordships of the Privy Council, having ruled that *Jewahir Singh* held as trustee of the joint family, no length of time would bar a suit against him; and the learned counsel quoted sect. 10 of Act XV. of 1877. The counsel for the Defendant replied that as the property was not vested in trust for any specific purpose, the section quoted is not applicable; that the case comes under No. 109, Schedule II.

of the *Limitation Act*. The property claimed by the Plaintiff was not vested in *Jewahir Singh* in trust for any specific purpose. The plaint alleges that it is property acquired with the profits of the joint estate. The claim is not to follow up the trust property in *Jewahir Singh's* hands, but rather to have an account of his stewardship, and a decree for a share of the profits, or the property purchased with the profits. I agree with the learned counsel for the Defendant that sect. 10, Act XV. of 1877, does not apply. But I do not agree in his view that the case is governed by No. 109, Schedule II., Act XV. of 1877. That article refers to a suit 'for the profits of immoveable property belonging to the Plaintiff, which have been wrongfully received by the Defendant.' In this case the immoveable property did not belong to the Plaintiff; all the right he had was that of a member of a joint undivided Hindu family. Nor were the profits wrongfully received by the Defendant; *Jewahir Singh*, as managing member of the joint family, had a right to receive the profits. Whether he wrongfully withheld the whole of those profits from the Plaintiff is another question. The case does not quite fall under No. 127, Schedule II. of the *Limitation Act*, as a suit 'by a person excluded from joint family property to enforce a right to share therein,' because the Plaintiff has not sued to enforce his right to share in the joint property, but has sued for a specific share of the profits. I am of opinion that the claim being for an account, and for a share of profits, and of property purchased with profits, falls under No. 120, Schedule II., as 'a suit for which no period of limitation is provided elsewhere in this schedule;' and the time allowed is six years from the date when the right of action accrued. The original suit, in 1865, was instituted on the 28th of August, in the Settlement Court. Such Courts did not entertain claims to profits. Act XVI. of 1865, however, was then in force. It provides that suits relating solely to the title or succession to land, or to any right in respect of any land, shall be heard in the Revenue or Settlement Courts. But Plaintiff, as a member of a joint undivided Hindu family, had a right to more than the actual land—he had a right to share in the common purse; and he might have sued to enforce his right to share, or for partition, in the Civil Court. That his right to do so had

J. C.
1886
PIRTHI PAL SINGH v. THAKUR JEWAHIR SINGH.

accrued in 1865 is beyond doubt, for, in his petition of the 10th of October, 1865, *Jewahir Singh* denied the Plaintiff's right to share in the estate. Since then *Jewahir Singh* has persistently denied the right; and Plaintiff having failed to sue to enforce his right to share, or for partition, at that time, cannot now recover a share of the profits in a suit instituted after the lapse of fifteen years.

"I hold, then, that the claim of *Hurdeo Bux* for an account for a share of profits, and for a share of the property purchased with the profits, is barred by limitation.

"It is further contended that *Parbut Singh* and *Ganeshi Singh*, having resigned their rights in the family property—the shares so resigned should be divided equally between Plaintiff and *Jewahir Singh*. There is nothing on the record to shew that these four persons were the only members of the joint family. *Hurdeo Bux*, in his deposition, has said he had a son. If *Hurdeo Bux* was a member of the joint family, *primâ facie* his son would be also. Had Plaintiff remained in enjoyment of his rights, as member of a joint and undivided Hindu family, he would doubtless have benefited by this resignation, if it took place. But, having been excluded from such enjoyment for more than fifteen years, he cannot now require *Jewahir Singh* to share with him any advantages that he may have secured by compromise or other arrangement.

"The first five grounds of appeal refer to the partibility of the estate; but having found that Plaintiff is not entitled to any share sued for, it is unnecessary for me to go into the matter of this question. Plaintiff certainly alleges that he is in possession of one-third of the 113 villages; but his right to separate that share is not before me in this suit."

From this judgment *Hurdeo Bux* alone appealed to Her Majesty.

In the second suit the Judge, on the 15th of February, 1883, "decreed and declared that the Defendant," (*i.e. Hurdeo Bux*) "is only entitled to one-third of the profits of the property (as a member of the family) described and governed by the judgment of the Privy Council, dated the 1st of March, 1879, which is identical with the property in suit here."

As to the impartibility of the estate in question, which the Judge held to be established, he referred to and set out at length part of his judgment in the first suit, upon the same issue; and he expressed his opinion that his judgment on that point had not been overruled by the Judicial Commissioner, who had not dealt with the question, inasmuch as he disposed of the suit on another point.

On the 16th of July, 1883, the Judicial Commissioner ordered that the decree of the District Judge should be amended, and that *Hurdeo Bux* should be declared entitled to have one-third of the estate separately apportioned to him; the said one-third share so allotted to him to be held by *Hurdeo Bux*, as a sub-proprietor, and subject to the payment of the Government revenue, plus 10 per cent.

The Judicial Commissioner in his judgment held that the question of the impartibility of the talook, was not concluded by the decision as to such impartibility by the District Judge in his judgment in the first suit, inasmuch as he (the Judicial Commissioner), on appeal from that judgment, although he affirmed the Judge's decree, yet declined to decide as to whether that judgment was correct in holding the talook to be impartible.

And taking up the question, the Judicial Commissioner held that their Lordships of the Judicial Committee had not before them the question of impartibility, and so had not decided it, but had declared that *Hurdeo Bux* was entitled to the rights of a member of a joint Hindu family, according to the rules of the Mitakshara; and that one of the rights of a member of such a family is to insist on a partition of the joint family estate, and therefore *Hurdeo Bux* was entitled to have a definite share of the family estate separated for himself.

And the Judicial Commissioner further held that there is nothing, either in the fact of a talook descending under the *Oudh Estates Act* according to primogeniture, or in the terms of that Act or of the sanad, which made the talook in question impartible, and that *Hurdeo Bux* was therefore entitled to partition of his share, but would have to pay the Government revenue and talookdari dues to *Jewahir Singh*.

As to *Jewahir Singh's* claim to a double share of the villages in

J. C.
1886
PIRTHI PAL SINGH v. THAKUR JEWAHIR SINGH.

the third schedule to the plaint, as having been acquired by him and his father by their own personal exertions and good management, the Judicial Commissioner rejected it on the ground that *Jewahir Singh* "has failed to prove that he has acquired any distinct property by aid of the joint funds."

Leith, Q.C., and *C. W. Arathoon*, for the Appellants, contended that the first suit, that brought by *Hurdeo Bux*, should have been decreed with costs, and the second, that brought by the Respondent *Jewahir Singh*, should have been dismissed with costs. It had been declared by the judgment in Law Rep. 6 Ind. Ap. that the 113 villages then in suit were held by *Jewahir Singh* "in trust for the family as a joint family estate." *Jewahir*, during the long time that he had been in wrongful possession of that joint estate had made purchases with the profits. Such purchases were accretions to the joint estate, and the Plaintiff was entitled to have them brought into partition and to be allotted his share thereof. *Hurdeo Bux* was entitled to a decree for partition of the whole. In dismissing his suit as barred by limitation the Judicial Commissioner completely misinterpreted the rights of the parties as declared by the Order in Council and their consequent remedies. Similarly the District Judge erred in holding that the estate was impartible, and that the Order in Council or the judgment in 6 Ind. Ap. had so regarded it. He was wrong also in holding that the Civil Court had no jurisdiction to entertain the claim for profits or to decree the Defendant to come to an account of his receipts. As regards the second suit, that was not maintainable, having regard to its nature and to the circumstance that by it *Jewahir* was seeking the same relief as he had done in a previous suit not in the record which had been dismissed by the Judicial Commissioner by his order of the 8th of July, 1881, for want of jurisdiction, which order had not been appealed from. The Judicial Commissioner was clearly wrong in decreeing to the Defendant under proprietary rights. The only question was whether he was or was not entitled to proprietary rights. Moreover, no claim to a double share was made out.

Reference was made to Act XIX. of 1868, s. 83; *Civil Procedure Code*, s. 244; Act XV. of 1877, Sched. II., art. 127.

J. C.
1886
PIRTHI PAL SINGH v. THAKUR JEWAHIR SINGH.

Doyne, and *Thomas*, for the Respondents, contended that the decree of the Judicial Commissioner in the first suit was right and ought to be affirmed; and that the decree of the same Court in the second suit, so far as it declared the right of *Hurdeo Bux* to have one-third of the estate separately allotted to him, was wrong, and ought to be reversed or varied. It was contended that *Hurdeo Bux's* claim was barred by limitation: Act XV. of 1877, Sched. II., art. 127. The suit, moreover, was barred, as held by the first Court, by Act XIX. of 1868. He was, by the effect of the Privy Council judgment, so far a co-sharer as that he could not assert his rights in a Civil Court. He obviously must go to the Rent Court as regards the 113 villages, and his rights to the remaining property stood on sufficiently similar grounds to make him amenable in respect of them to Act XIX. of 1868. Otherwise, if he had no separate share, he could not sue upon partition for a definite share of the profits of joint estate. The profits are not divisible till the estate is divided. In the second suit the Judicial Commissioner rightly held the talook to be impartible. In fact, the question was no longer open. The District Judge had held it so by his decree in the first suit, and that decree had never been reversed.

Leith, Q.C., replied.

1887
Feb. 26.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The parties to the suits which are the subject of these consolidated appeals are members of a Hindu family in *Oudh*, being the sons and grandson of three brothers, *Hewanchal Singh*, *Bhawani Singh*, and *Fateh Singh*. One of them, *Hurdeo Bux*, died pending the appeal to Her Majesty in Council, and the Appellants are his sons and representatives. Prior to the annexation of the kingdom of *Oudh* the family was joint, the Respondent, *Jewahir Singh*, being the head of it, and the manager of the family property. The lands which belonged to the family were confiscated by the British Government by Lord *Canning's* Proclamation of March, 1858, and on the 28th of April, 1858, a summary settlement of them was made with *Jewahir Singh*. He was

J. C.
1887
PIRTHI PAL SINGH v. THAKUR JEWAHIR SINGH.

consequently included in the list of talookdars in accordance with the Government letter of the 10th of October, 1859, and a sanad was granted to him. After the passing of Act I. of 1869 he was also registered in List No. 1 under sect. 8 of that Act, and in List No. 5. On the 28th of August, 1865, *Hurdeo Bux* and *Parbut Singh* brought a suit in the Settlement Court, which then had jurisdiction in the matter, against *Jewahir Singh* by a petition of plaint, in which they stated that since the death of their fathers they had been, according to the old order of things, living together, their expenses being paid out of the profits of the estate, the Plaintiffs continuing in possession of the talooka, and the kabuliat standing in the name of the Defendant; that he intended to dispossess them and keep them out of their permanent right to the profits; and they prayed that after inquiry proper orders be passed so that they be not deprived of their rights. In a written statement, dated the 6th of October, 1865, they stated that they had been compelled by an order of the Criminal Court, dated the 15th of September, 1865, to give up possession, but that previously to that time they had held continuous possession. The Defendant in his written statement alleged that he had held possession of the land without any co-sharer, and that a summary settlement had been made with and a sanad granted to him alone. The Courts in *Oudh* decided in favour of *Jewahir Singh*, and *Hurdeo Bux* appealed to Her Majesty in Council. It is unnecessary to refer to the judgments of the *Oudh* Courts, as the rights of the parties were determined by the final order of Her Majesty in the appeal. The case was twice before this Committee, and is reported in Law Rep. 4 Ind. App. 178, and 6 Ind. App. 161.

On the first occasion their Lordships, after referring to two previous cases, *Thukrain Sookraj Koowar* v. *The Government and Others* (1), and *Widow of Shunkar Sahai* v. *Rajah Kashi Pershad*, not then reported but since reported (2), say :—

"Their Lordships are of opinion that, up to the time of Lord *Canning's* proclamation the whole of the villages mentioned in the summary settlement were the joint family property of the Petitioner and *Parbut Singh* and the Defendant, and that they were either ancestral or purchased with the proceeds of ancestral

(1) 14 Moore's Ind. App. Ca. 112. (2) Law Rep. Ind. Ap. Supp. Vol. p. 220.

estate. The Defendant himself, more than a year after the date of the summary settlement, stated in his deposition on oath made in another case, on the 8th of July, 1859, that the custom prevailing in his family was that if his cousins, meaning the Plaintiff and *Parbut Singh*, who were his partners, should claim, they would get their shares divided. He said, 'They at present live with me, and receive food and clothing.' It does not appear clearly from the latter words whether the estate was held as joint family property or whether the Defendant merely made an allowance to the Plaintiff."

Their Lordships then, after saying that the Lower Courts appeared to have decided the case merely upon the ground that the Defendant was protected by the sunnud, advised Her Majesty that the Commissioner should be directed to try, or to refer to the Settlement Officer for trial, the issue whether the Respondent had in any and what manner agreed or become bound to hold the villages comprised in the summary settlement and sunnud, or the rents and profits thereof, in trust for the Appellant and *Parbut Singh*, or either of them. Her Majesty's Order in Council was made accordingly.

On the 13th of December, 1877, the Commissioner found that "there is no proof of any fresh act or agreement on the part of the Respondent by which he became bound to hold the villages alluded to in the issue set in trust for the Appellant and *Parbut Singh*, but that they were an undivided Hindu family up to 1865, and that the joint interest extended to the whole estate then in possession, ancestral and acquired."

The appeal came before this Committee again in January, 1879, and judgment was delivered on the 1st of March. It is sufficient to quote the following passages from it. Having stated the finding of the Commissioner, and that it was fully warranted by the evidence, it says:—

"Their Lordships are of opinion that the facts so found, coupled with the statement of the Defendant in his application for a summary settlement, to the effect that *Hurdeo Bux* was his partner, and with his deposition of the 8th of July, 1859, in which he stated that the custom prevailing in his family was that if his

BENGAL SECRETARIAT LIBRARY.

J. C.
1887
PIRTHI PAL SINGH v. THAKUR JEWAHIR SINGH.

cousins, meaning the Plaintiff and *Parbut Singh*, who were his partners, should claim, they could get their shares divided, afford sufficient grounds to justify their Lordships in presuming that, up to the time of the quarrel in 1865, it was the intention of the Defendant that the villages included in the summary settlement and sunnud should be held by him in trust for the joint family, and as a joint family estate, subject to the law of the Mitakshara."

Their Lordships then state the reasons for their opinion, that the Act I. of 1869 did not operate so as to change the relative conditions of the parties, and to put an end to the trust upon which the Defendant had previously held the estate, and conclude by saying:—

"The plaint does not allege that the Plaintiffs have been dispossessed of their rights, but merely that the Defendant intends to dispossess them, and to put a stop to the profits enjoyed by them, and they simply pray that they be not deprived of their right.

"Their Lordships must deal with the case as it stood at the commencement of the suit. At that time there does not appear to have been any complete separation or division of the family, and the Plaintiffs do not pray for a partition of the estate. *Hurdeo Bux* was not entitled to any definite portion of the estate, but merely to the rights of a member of a joint Hindu family. Their Lordships cannot therefore do more than humbly advise Her Majesty, which they will do, to allow the appeal, and to reverse the judgments and decrees of both the Lower Courts, and to declare that the Defendant holds the villages in suit in trust for the joint family, and as a joint family estate governed by the rules of the Mitakshara, and to order and decree that the Defendant do cause and allow the said villages, and the proceeds thereof, to be managed and dealt with and applied accordingly.... Their Lordships have nothing to do with any agreement or arrangement which may have been made by any of the parties subsequently to the commencement of the suit, and they will humbly advise Her Majesty that the decree to be made in this appeal be declared to be made without prejudice to any question that may arise in

respect of any agreement or arrangement, if any, which may have been made or entered into by or between any of the parties to the suit, subsequent to the commencement thereof."

Any member of a joint Hindu family may sue for a partition of the family estate, unless there is a family usage or a special law which makes it impartible. *Jewahir Singh* had himself said in 1859 that the estate was partible, and this is one of the grounds upon which it is said that up to the time of the quarrel in 1865 it was his intention that the villages included in the summary settlement and sunnud should be held by him in trust for the joint family, and as a joint family estate. Their Lordships notice that the Plaintiffs did not pray for a partition of the estate, and therefore say they cannot do more than advise Her Majesty to declare that the villages were held in trust for the joint family, and as a joint family estate. The order which followed this was applicable to a joint family property. There does not appear to be any reason for thinking that it was considered that the estate was impartible, and was to be held as such in trust for the family.

The order of Her Majesty in Council is dated the 22nd of March, 1879. In or about May, 1879, *Hurdeo Bux* applied to the Court of the Deputy Commissioner of *Sitapur* for execution of it. The Deputy Commissioner made an order, from which there was an appeal to the District Judge, and from him to the Judicial Commissioner, who, on the 11th of November, 1879, ordered proclamation to be made by beat of drum in each of the 113 villages forming the subject of the suit of what had been declared by the Order in Council. On the 2nd of June, 1880, *Hurdeo Bux* applied, under Act XVII. of 1876, the *Oudh Land Revenue Act*, sects. 57 and 58, to have his name entered as a co-sharer in the talooka in the register which the Deputy Commissioner of each district is by the 56th section of the Act directed to keep. And on the 4th of June, 1880, the Deputy Commissioner ordered that—

"The name of *Thakur Hurdeo Bux* will therefore be entered in the register of co-sharers (the extent of his interest being one-third) in the joint family estate, consisting of the villages mentioned in the judgment of the Privy Council.

J. C.
1887
PIRTHI PAL SINGH v. THAKUR JEWAHIR SINGH.

"*Thakur Jewahir Singh* will remain manager and lambardar.

"This order refers to the following villages:—

"1. Villages comprised in the summary settlement	78
"2. Villages granted in reward for services during the mutiny (afterwards demarcated as 12) .	20
"3. Villages acquired from the profits of the estate after summary settlement	15
	113
"Afterwards demarcated as . . .	105

"*Thakur Jewahir Singh* will pay Applicant's costs."

This order was affirmed on appeal on the 13th of July, 1880, but the Judicial Commissioner, on an appeal from another order relating to the execution, held that, in execution of the Order in Council, *Hurdeo Bux* could not obtain an account from *Jewahir Singh* of the rents and profits of the talook from the commencement of the litigation, but for that purpose must proceed by suit. This was on the 2nd of August, 1880, and on the 14th of December, 1880, *Hurdeo Bux* instituted the first of the suits which are the subject of these appeals.

The plaint, after stating the facts, and that on the 30th of May, 1879, the Defendant refused to determine the amount of wasilat (amount collected), and to adjust accounts of the profits which had accrued during the pendency of the suit, and with which considerable additions had been made to the family estate, and to fix the exact extent of the share to which the Plaintiff was entitled, prayed that a "bazdawa" (petition of withdaawal of suit), dated the 5th of February, 1874, executed by *Parbut Singh* and *Ganeshi Singh* in *Jewahir Singh's* favour, was invalid and of no effect as against a previous agreement of the 23rd of March, 1870, executed in the Plaintiff's favour, and that the Plaintiff was entitled, as against *Jewahir Singh*, to recover *Parbut Singh* and *Ganeshi Singh's* share in addition to his own; that the Plaintiff should be put in separate possession by partition to the extent of the aforesaid shares of the 113 villages, and all the property which had been acquired by *Jewahir Singh*, with the profits of the joint estate and the joint property not included

in the former suit, a list of which was attached to the plaint. It also prayed that, to the extent of the above-mentioned shares, the Defendant should be ordered to render accounts of the profits during his management, and to pay all the money that might be found due after deducting all proper charges and costs of purchasing estates, with the exception of so much profits of the third share of the 113 villages for which the Plaintiff's name had been entered in the revenue records, and for which he could seek his remedy from the Rent Court, since 1288 F., the time when his name was entered. The lists attached to the plaint contained the names of 144 villages, in addition to the 113, also a number of debts due to the estate on mortgages, a large number of bond debts and moveable property of various kinds of considerable value.

Jewahir Singh, in his written statement, said that by the bazdawa of the 5th of February, 1874, and by way of family compromise, *Parbut Singh* and *Ganeshi Singh* relinquished all rights and claim to a share in the talooka in his favour, and declared themselves satisfied with and accepted from him certain property as and by way of maintenance which had been awarded to them on the 11th of July, 1869, under an arbitration of the *British Indian Association;* that the claim to property in his possession at the date of the institution of the suit in 1865 was barred by the law of limitation as well as by sect. 43 of Act X. of 1877; that the Plaintiff was not entitled to any accounts from 1865 or any other date, and was in the position of an ordinary sharer suing a co-sharer who would have his remedy in the Rent Courts and in respect of three years' profits only; that the Plaintiff was not entitled to the partition prayed for, and that he, *Jewahir Singh*, held the talooka as an integral impartible estate according to the rule of primogeniture without any trust in respect of such talookdary rights and *status*, though, as ruled by Her Majesty in Council, subject to a trust in respect of a portion of the profits in favour of the Plaintiff. The plaint was then amended by making *Parbut* and *Ganeshi Singh* Defendants, and praying that if the Plaintiff was held to be not entitled to their full share it might be decreed that as a joint property it was divisible in equal shares between him and *Jewahir Singh*.

The District Judge in his judgment, dated the 3rd of January, 1882, held that the suit was not barred by the law of limitation.

J. C.
1887
PIRTHI PAL SINGH v. THAKUR JEWAHIR SINGH.

This, in their Lordships' opinion, was right. The Plaintiff had, in 1879, been declared by the Order in Council entitled to share in the 113 villages and the proceeds thereof as a joint family estate. It was preposterous to allege, as the written statement did, that his claim to that was barred by the law of limitation. It clearly was not. It was equally preposterous to allege that he had his remedy in the Rent Court for the profits of the estate received by *Jewahir Singh*, whilst the suit of 1865 was pending, and that he could only recover three years' profits. The provision in the *Oudh Rent Act* (XIX. of 1868) supposed to be applicable, is clause 15 of the 83rd section, which gives exclusive jurisdiction to the Courts of Revenue in *Oudh* over suits by a "sharer against a lumberdar or co-sharer for a share of the profits of an estate or any part thereof, or for the rendering and settlement of accounts in respect of such profits." And by the 106th section, suits for the recovery of a share of profits are to be instituted within three years from the date on which the share of profit claimed shall have become due. A member of a joint Hindu family cannot sue for a share of profits as he has no definite share until partition. These provisions might apply to the profits of the 113 villages after *Hurdeo Bux* had been entered in the register as a co-sharer under the order of the 4th of June, 1880, but they are applicable only to co-sharers, and it seems only where the co-sharers and lamberdar are entered in the register, and therefore they could not apply to the 144 villages, and certainly not to the moveable property of the family. Moreover, this defence is inconsistent with the defence that the talooka is impartible, for by the entry in the register *Hurdeo Bux* was made a co-sharer to the extent of one-third. That entry still remains, and *Hurdeo Bux* may fairly contend that there has been a partition of the 113 villages. This is the reason for his excepting from his prayer for an account the profits of those villages since the entry in the register.

The District Judge in considering the question of the partibility of the estate took this view of the entry in the register, and said the revenue authorities had acted upon an interpretation which they had placed upon the Order in Council. He then proceeded to dispute that interpretation, and quoting only the passage in the judgment of this Committee, "and the Plaintiffs do not pray for partition of the estate. *Hurdeo Bux* was not

entitled to any definite portion of the estate, but merely to the right of a member of a joint Hindu family;" he says "the Plaintiff could not, therefore upon the strength of the Privy Council's decision, claim a partition of the estate to the extent of his share in the profits, for the Privy Council has distinctly recorded that the Plaintiff is not entitled to any definite portion of the estate." This seems to their Lordships a rather strange misapprehension, for until partition no member of a joint Hindu family is entitled to a definite portion of the family estate, and if that be a reason for his not being able to claim a partition of the estate a partition could never be claimed. Independently of the construction which the District Judge thus put upon the judgment of this Committee, he pronounced his own opinion that under the Act I. of 1869, or the sunnud, the estate was not partible. The District Judge then proceeded, erroneously in their Lordships' opinion, to treat the claim for an account of the proceeds of the family estate as a claim for mesne profits, and quoted the provisions of the Code of Procedure as to mesne profits. These provisions are intended for and are applicable to suits for land or other property in which the Plaintiff has a specific interest, and not to the suit which was instituted in 1865, or to a suit for a partition where he has no specific interest until decree. He then said that as there was no doubt the principal parties in the case stand in the position of co-sharer and lamberdar respectively, the claim to any share in the profits of the estate must be preferred in the Revenue Court. So far as regards the 113 villages after the entry of the names this might be true, but the Rent Court had no jurisdiction to take an account of the family property, consisting of the proceeds of those villages and of other property, and to make a partition of the whole. The most it could do would be to make a partition of the 144 villages, or any others that might have been purchased, and become family property. Finally, after deciding that the agreement of the 23rd of March, 1870, did not give *Hurdeo Bux* a title to *Parbut Singh's* share, he dismissed the suit with costs.

Hurdeo Bux appealed to the Judicial Commissioner, who, on the 12th of September, 1882, gave his judgment. He agreed with the District Judge that *Hurdeo Bux* had not acquired a right to the shares of *Parbut Singh* and *Ganeshi Singh*, and he held

J. C.
1887
PIRTHI PAL SINGH v. THAKUR JEWAHIR SINGH.

that *Hurdeo Bux*, having had his name entered in the revenue registers as a co-sharer, shewed that he had ceased to be a member of the joint Hindu family, and that his claim to an account for a share of the profits and for a share of the property purchased with the profits was barred by the law of limitation, because he had failed to sue to enforce his right to share or for partition in 1865. It is difficult to see how it could be thought that he failed to sue to enforce his right. In their petition to the Settlement Court in 1866, by which the suit was begun, he and *Parbut Singh* prayed that, after inquiry, proper orders might be passed so that they should not be deprived of their rights, and the Order in Council declared that *Jewahir Singh* held the 113 villages as a joint family estate, and that they and their proceeds should be applied accordingly. After that there could be no application in the present suit of the law of limitation to those proceeds.

The Judicial Commissioner then held that *Hurdeo Bux* was not entitled to any benefit from the resignation by *Parbut Singh* and *Ganeshi Singh*, because he had ceased to be a member of the joint family. The bazdawa was executed on the 5th of February, 1874, and their Lordships are unable to understand what ground there was for saying that *Hurdeo Bux* had then ceased to be a member of the joint family as regards the estate, though in other respects there might have been a separation. Finally, the Judicial Commissioner held that it was not necessary to go into the question of the partibility of the estate, and dismissed the appeal.

Their Lordships have indicated their opinion that the conclusions of the Lower Courts in the first suit, except that of the District Judge on the question of limitation, are erroneous, and it is now necessary to refer to the second suit. This was brought by *Jewahir Singh* against *Hurdeo Bux* on the 4th of August, 1881, and the plaint prayed for a declaration of the share the Defendant was entitled to in the villages named in the schedules, which were said by the District Judge to be identical with the property in suit in 1865, and that it might be further declared that the Plaintiff was entitled to hold the property mentioned in the schedules as an integral impartible and indivisible estate or talooka, subject to the beneficial interest of the Defendant in respect of the profits thereof to the extent of his share as declared by the Court. The District Judge adhered to the opinion

he had declared in the first suit, that the estate was impartible, and said that *Hurdeo Bux* was only entitled to one-third of the profits of the property. The Judicial Commissioner, on an appeal to him, had to decide the question of partibility, which, in the first suit, he had left undecided. In his judgment on the 16th of July, 1883, he decided that *Hurdeo Bux* should "be declared entitled to have one third of the estate separately apportioned to him, the one-third share so allotted to him to be held by him as a sub-proprietor, and subject to the payment of the Government revenue, plus 10 per cent."

The decree which was passed upon this judgment cannot be allowed to stand. It does not give to *Hurdeo Bux* the right which by Her Majesty's Order in Council he was declared entitled to. The villages and the proceeds thereof were by that order declared to be a joint family estate, governed by the rules of the Mitakshara, and one member of the family could not rightly be made a sub-proprietor to another member of his share of the family property. Also the contention of *Jewahir Singh* in this and in the first suit, that he held the talooka as an integral impartible estate to himself and his heirs according to the rule of primogeniture, subject to a trust in respect of the profits, is inconsistent with the estate being governed by the rules of the Mitakshara. The direction that he should cause and allow the villages and the proceeds thereof to be managed and dealt with and applied "accordingly," that is, as a joint family estate, shews that the declaration that he held the villages in trust for the joint family was not intended to give him an impartible estate. He did hold them in trust for the joint family, but as a joint family estate they were subject to partition, and as a trustee, he is bound to allow the partition to be made. Notwithstanding *Hurdeo Bux's* clear right to a share of the profits of the villages, *Jewahir Singh* has pertinaciously refused to give any account of what he has been receiving since 1865, and their Lordships regret to see he has succeeded up to this time in not doing so. The suit for partition and an account stands dismissed by both the Lower Courts, and *Hurdeo Bux* has only been declared in the second suit to be a sub-proprietor of one-third share, against which declaration he appealed to Her Majesty in Council. It is unnecessary to consider whether he became

J. C.
1887
PIRTHI PAL SINGH v. THAKUR JEWAHIR SINGH.

entitled as he claimed to part of the shares of *Parbut Singh* and *Ganeshi Singh*, because, in their Lordships' opinion, he was concluded from claiming more than one-third share in the family property, by obtaining the order for the entry of his name as a co-sharer of one-third in the 113 villages, which order was affirmed on appeal, and is treated in the plaint in the first suit as a subsisting order. The second suit was unnecessary, as the questions raised in it might have been decided upon the issues framed in the first suit. Their Lordships think that the second suit should be finally disposed of by reversing the decrees of both the Lower Courts, and ordering the suit to be dismissed with costs in those Courts and that the cross appeal should be dismissed with costs. The first suit should be remanded to inquire what the joint property of the family consists of, including therein the villages held by *Parbut Singh* and *Ganeshi Singh*, and for that purpose to take the usual accounts, and when that has been done to allot to *Hurdeo Bux* a third part thereof, and to order that he recover the third part of the moveable property, with the costs of the suit, up to the making of but not including the costs of the inquiry, from *Jewahir Singh;* and to order that the costs of the inquiry, and taking the accounts, and of the partition, be paid out of the estate, and also to order that *Hurdeo Bux* be at liberty to apply under sect. 57, Act XVII. of 1876, the *Oudh Land Revenue Act*, to have his name entered as a co-sharer with *Jewahir Singh* in the immoveable property, to the extent of one third. The Judicial Commissioner may remand the suit to the District Judge to do what is above directed, and their Lordships, under the circumstances, are of opinion that if any application should be made under the provisions of the Code of Civil Procedure for the appointment of a manager or receiver of the estate during the inquiry and taking the accounts, and until the partition, it would be a proper case for granting it. Their Lordships will humbly advise Her Majesty to reverse the decrees of the Lower Courts, and to make a decree remainding the suit to the effect and containing the directions before stated. The costs of these appeals and of the cross appeal are to be paid by *Jewahir Singh.*

Solicitors for Appellants: *T. L. Wilson & Co.*

Solicitors for Respondents: *Barrow & Rogers.*

BABU SHEO LOCHUN SINGH . . . . PLAINTIFF;

AND

BABU SAHEB SINGH . . . . . DEFENDANT.

J. C.*
1887
Feb 10.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Hindu Law—Accumulations by Widow—Presumption that Accumulations belong to Husband's Estate.

Where a Hindu widow invests the accumulations from her deceased husband's estate, *primâ facie* it is her intention that they should be regarded as accretions thereto, and not as a separate estate descendible in a different line of succession.

Isridut Koer v. *Mussumat Hansbutti Koerain and Others* (Law Rep. 10 Ind. Ap. 150) followed.

APPEAL from a decree of the High Court (Sept. 14, 1883), affirming with modifications in favour of the Respondent a decree of the Subordinate Judge of zillah *Shahabad* in *Tirhoot* (Dec. 31, 1881).

The facts are stated in the judgment of their Lordships.

The points on which the Courts below differed were those which arose on the Respondent's cross appeal to the High Court, and so far as material were as follows:—

First, the Subordinate Judge held that *Rekaba* had power under the Mitakshara law to dispose absolutely of her husband's moveable estate, and that the gift in question was consequently good so far; while the High Court held, on the authority of *Bhugwandeen Doobey* v. *Myna Baee* (1), that a Hindu widow under Mitakshara law had "no power to alienate the estate inherited from her husband to the prejudice of his heirs, whether such estate consist of moveable or immoveable property," and accordingly gave the Plaintiff a decree for one-third of the admitted value of the moveable estate of *Sheodyal*.

Secondly, the Subordinate Judge held that as to certain mouzahs

* *Present*:—LORD WATSON, LORD FITZGERALD, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

(1) 11 Moore's Ind. App. Ca. 487.

J. C.
1887
BABU SHEO LOCHUN SINGH v. BABU SAHEB SINGH.

and houses which had been acquired by the widows after their husband's death it was not necessary to decide whether they had acquired them out of the income of his estate, for even if so acquired, the widows would have an absolute right to alienate, and consequently *Rekaba's* gift would be so far good against the Plaintiff; while the High Court on the admission that the properties in question had been acquired out of *Sheodyal's* estate, and it appearing that the same had been dealt with by the widows as accretions to their husband's estate, held on the authority of *Isridut Koer and Another* v. *Hansbutti Koerain and Others* (1), that *Rekaba* had no power to alienate those accretions without justifying necessity, and accordingly gave the Plaintiff a decree for a one-third share of those properties also.

Branson, for the Appellant, contended that, on the evidence, the widows did not purchase the properties out of their husband's estate, with the intention that they should accrete thereto. The just inferences were that they intended to keep them distinct, and if so, even if bought with the income of their husband's estate, they were the absolute property of the widows and passed by their gift. Reference was made to *Isridut Koer* v. *Mussumat Hansbutti Koerain* (1).

Cowie, Q.C., and *Doyne*, for the Respondent, were not called on.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The suit which is the subject of this appeal was brought by the Respondent, who claimed as one of the heirs of *Sheodyal*, who died in 1827, to recover from the Appellant a third share of the property which had been left by *Sheodyal* at his death, and to which his two widows, *Pranpeari* and *Rekaba* became entitled, and also a third of the properties which had been purchased by the widows with, as he alleged, the income of the property which they inherited. *Pranpeari* and *Rekaba* in the first place held the properties jointly, and *Pranpeari* died in 1870, leaving *Rekaba* surviving her, and in possession of the whole of the estate.

(1) Law Rep. 10 Ind. App. 150.

It appears that on the 19th of October, 1875, *Rekaba* executed a deed of Atanama, by which she professed to give to the Appellant, who was the Defendant in the suit, the whole of the property, not only that which came to the widows from *Sheodyal*, but the properties which had been purchased by them; and it was also alleged that the Defendant had been adopted by the widows with the permission of *Sheodyal* as his son.

Various issues were settled. The defence set up various matters, including the law of limitation, the adoption of the Defendant, and the deed of Atanama. All the issues were found in favour of the Plaintiff, the Respondent, except that with respect to the question whether the Plaintiff was entitled to recover a share of the properties which had been purchased by the widows. The lower Court found that the widows were entitled to alienate that property, and consequently that he was not entitled to it. The High Court, when the case came before it upon appeal, upon this question said that upon the evidence before them there was not the slightest doubt that the properties in question, namely, the purchased properties, were dealt with by the widows as accretions to their husband's estate, and that they were treated in the deed of gift precisely in the same way as the admitted properties of *Sheodyal* were treated.

Their Lordships have been referred by Mr. *Branson* to the different parts of the evidence which he considered bore upon the question whether the properties were purchased by the widows out of the income of the descended property, and whether their intention was to keep those properties distinct. Certainly the evidence is not such as would shew that the High Court in coming to the conclusion they did were not quite justified by it.

The authority upon this matter is the case of *Isridut Koer and Another* v. *Mussumat Hansbutti Koerain and Others* (1). At the conclusion of the judgment, their Lordships state the matter which has to be looked at in deciding whether the property acquired or purchased by the widows is to descend with the husband's estate, or is to be treated as a separate estate. They say: "Neither with respect to this object"—namely, to change the succession—"nor, apparently, in any other way have the widows made any

(1) Law Rep. 10 Ind. App. 150.

J. C.
1887
BABU SHEO LOCHUN SINGH v. BABU SAHEB SINGH.

distinction between the original estate and the after purchases." Where a widow comes into possession of the property of the husband, and receives the income, and does not spend it, but invests it in the purchase of other property, their Lordships think that, *primâ facie*, it is the intention of the widow to keep the estate of the husband as an entire estate, and that the property purchased would, *primâ facie*, be intended to be accretions to that estate. There may be, no doubt, circumstances which would shew that the widow had no such intention, that she intended to appropriate the savings in another way. There are circumstances here which would indicate that it was the intention of the widows to keep the estate entire and that they did not intend that the husband's estate and the subsequently purchased properties should go in a different line of succession, because their act, in what they did with regard to the Defendant, was to make a gift to him of the whole of the property and professing to do it so as to, what seems to be called, carry out the intentions of *Sheodyal* and found a thakoorbari, with which the estate would be connected. The transaction appears to indicate that their intention was not to create separate estates, one to go in one way, and another in another, but to keep the whole as one entire property; and applying what is said in the case of *Isridut Koer and Another* v. *Mussumat Hansbutti Koerain and Others* (1) to the present case, there do not appear to be circumstances which would shew that there was any other intention than that the purchased property should be accretions to the inherited property. The High Court has found that, and their Lordships see no ground for saying that the Court has not come to a proper conclusion from the evidence.

Their Lordships will therefore humbly advise Her Majesty to affirm the decision of the High Court, and to dismiss the appeal, and the Appellants will pay the costs.

Solicitors for the Appellant: *Watkins & Lattey.*
Solicitors for the Respondent: *T. L. Wilson & Co.*

(1) Law Rep. 10 Ind. App. 150.

THAYAMMAL AND KUTTISAMI AIYAN . DEFENDANTS;

AND

VENKATARAMA AIYAN . . . . . PLAINTIFF.

J. C.*
1887
Feb. 12, 15, 26.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Hindu Law—Adoption—No Power to adopt after Estate has vested in Son's Widow.

Held, that an adoption with the permission of sapindas by a Hindu widow to her husband, after her husband's estate has vested in his son's widow, is invalid.

Pudma Coomari Debi v. *Court of Wards* (Law Rep. 8 Ind. Ap. 229) and *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (10 Moore's Ind. Ap. 279) followed.

APPEAL from a decree of the High Court (March 21, 1884), affirming a decree of the District Court of *Trichinopoly* (Jan. 18, 1882), which declared in favour of the Respondent that the second Appellant had not been duly adopted by the first Appellant.

The grounds of suit were (1.) That the second Appellant was twenty-seven years of age at the date of his adoption; (2.) That his upanayanam had already been performed; (3.) That his adoption was unnecessary, as the person to whom he was adopted had died, leaving a son who married and died leaving a widow who had herself made an adoption.

The material passage in the judgment of the Lower Court is as follows:—

"As to the second Defendant's adoption, it is enough to say that even if made, it is invalid, if on this ground alone, that admittedly second Defendant's upanayanam had been performed before he was adopted. That such an adoption is invalid among Brahmins, in *Southern India*, has been affirmed in Second Appeal No. 434 of 1879, *Madras* High Court, reported at p. 69, vol. v., *Indian Jurist*: that ruling follows decisions of the *Madras* Sudder Court and High Court as therein shewn. It was here contended

* *Present*:—LORD WATSON, LORD FITZGERALD, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

J. C.
1887
THAYAMMAL AND KUTTISAMI AIYAN v. VENKATA-RAMA AIYAN.

that, even in that case, it was not decided that a brother's grandson might not, according to custom, be validly adopted after investiture with the sacred thread. But in the present case the second Defendant stands in no such relationship to the alleged adopter: the evidence shews that he is a very distant sapinda indeed, if a sapinda. The rule is clear, and it would have been an absurdity, the rule being as it is, to have admitted evidence which Defendants proposed to put in to shew that, by custom, such adoptions declared to be invalid by law are in fact valid by custom."

The High Court held as follows:—

"The decision of the Privy Council in *Pudma Coomari Debi* v. *Court of Wards* (1) is an authority that an adoption cannot be made by a mother after the estate has vested in the widow of her son, the power of the mother, if any was given by her husband, having then come to an end and being incapable of execution. In accordance with that decision we must hold that the adoption of the second Defendant, if made and if otherwise valid, cannot be sustained."

Mayne, and *H. H. Shepherd*, for the Appellant, contended that the High Court had misunderstood the effect of the Privy Council judgment to which they referred. Reference was made to *Viraragava* v. *Ramalinga and Others* (2); *Sri Raghunada* v. *Sri Brozo Kishoro* (3), and to *Pudma Coomari Debi* v. *Court of Wards* (1), which is a sequel to the case of *Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (4). In it their Lordships went carefully into the special terms of the adoption. The rule established is that whatever a husband can do in the way of adopting he can authorize his widow to do for him. If he has a son he can authorize his widow to adopt a son in the event of the death of the first son without issue or of the issue. And if the husband omits to give such authority his sapindas can do so for him. See *Rajah Vellanki Venkata Krishna Row* v. *Venkata Rama Lakshmi Narsayya and Others* (5). A son's widow cannot be deprived of

(1) Law Rep. 8 Ind. Ap. 229.
(2) Ind. L. R. 9 Mad. 148.
(3) Law Rep. 3 Ind. Ap. 154.
(4) 10 Moore's Ind. Ap. Ca. 279.
(5) Law Rep. 4 Ind. Ap. 1.

J. C.
1887
THAYAMMAL AND KUTTISAMI AIYAN v. VENKATA-RAMA AIYAN.

the estate which she has inherited, but a son adopted by her mother-in-law could take in succession to her. His adoption would not be invalidated by reason of his adoptive father's estate having vested elsewhere. On the contrary, it would be valid for all purposes except to enable him to deprive the son's widow of the estate. Reference was made to the *Tagore* Law Lectures, 1882, p. 129, to shew that there may be valid adoption after upanayanam. In this view the case should be remanded for the question of the validity and priority of the adoption to be settled. An adoption may be valid even though it does not oust the heirs. An authority to adopt might exist and survive though a grandson might be living and prevent its being acted upon till he died. The right to adopt under a power is capable of being suspended and afterwards revived. It may last for three generations. Similarly an adoption must be valid or invalid at the time it is made, but the rights conferred by it may be contingent and turn upon other events. See the *Berhampore Case* (1).

[SIR R. COUCH referred to a judgment of *Romeschunder Mitter* J., in *Ramsoonder Singh* v. *Surbanee Dossee* (2).]

Reference was made to *Puddocoomaree Debee* v. *Juggut Kishore Acharjee* (3).

The Respondent did not appear.

1887
Feb. 26.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This is an appeal from a judgment of the High Court at *Madras* in a suit instituted by the Respondent to have it declared that an alleged adoption of the second Defendant by the first Defendant was invalid. It appears that *Dorasami*, who was entitled to certain property, died many years ago, leaving *Thayammal*, the first Defendant, his widow, and also an only son, *Kuttisami*, his heir-at-law, surviving him.

Kuttisami, the son, married *Thangammal* and subsequently died without issue, leaving *Thangammal*, his widow, who, upon the death of her husband, succeeded as heir to the property.

(1) Law Rep. 3 Ind. Ap. 160, 154. (2) 22 Suth. W. R. 121.
(3) Ind. L. R. 5 Calc. 615.

J. C.
1887
THAYAMMAL AND KUTTISAMI AIYAN v. VENKATA-RAMA AIYAN.

It is alleged that, after the death of *Kuttisami*, the son, and during the life of *Thangammal*, his widow, *Thayammal*, with permission of sapindas, adopted the second Defendant as a son of her deceased husband. Several objections have been taken to that adoption, and, among others, that the son's widow having lawfully adopted a son to him, the father's widow had no power to adopt. The adoption by the son's widow was disputed, but it was objected on behalf of the Respondent that it was immaterial whether she had adopted or not, for that even in the absence of such adoption, the survival of the sons's widow and the vesting of the estate in her put an end to the right of *Thayammal*, his mother, to adopt a son to his father.

Their Lordships are of opinion that the objection is fatal to the adoption of the second Defendant. It is therefore unnecessary to express an opinion as to other objections to that adoption, or to consider whether there was or was not a valid adoption by the son's widow.

Their Lordships are of opinion that the High Court was correct in considering that the case is governed by the decision of this Committee in the case of *Pudma Coomari Debi* v. *Court of Wards* (1), which was founded upon the case of *Mussumat Bhoobun Moyee Debee* v. *Ram Kishore Acharj Chowdhry* (2).

It was contended by the learned counsel for the Appellant that all that was decided by the Judicial Committee in *Bhoobun Moyee's Case* was that the son adopted by the mother could not recover the estate from the widow of the son. This appears to have been the view taken by the Lower Courts in *Pudma Coomari's Case*. But this Committee, upon appeal, held that the case went much further. Nothing can be clearer or more explicit than the language used by the Committee in that case. They said, "The substitution of a new heir for the widow was, no doubt, the question to be decided, and such substitution might have been disallowed, the adoption being held valid for all other purposes, which is the view which the Lower Courts have taken of the judgment; but their Lordships do not think that that was intended. They consider the decision to be that upon the vesting of the estate in the widow of *Bhowani* (*i.e.*, the son), the power of

(1) Law Rep. 8 Ind. Ap. 229. (2) 10 Moore's Ind. Ap. Ca. 279.

adoption was at an end and incapable of execution, and if the question had come before them without any previous decision upon it, they would have been of that opinion." Their Lordships entirely concur in that view, and they are of opinion that the adoption, with the permission of sapindas in the present case, could have no greater effect as regards the right to property than the adoption under the deed of permission in the cases to which reference has been made.

For the above reasons they will humbly advise Her Majesty that the judgment of the High Court ought to be affirmed. The Respondent not having appeared, there will be no costs of the appeal.

Solicitors for Appellants: *Burton, Yeates, Hart & Burton.*

J. C.*
1887
Feb. 15, 16.

KRISHNA KISHORI CHOWDHRANI AND ANOTHER . . . . . } DEFENDANTS;

AND

KISHORI LAL ROY . . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Indian Evidence Act, s. 65, cl. C., s. 74—Secondary Evidence—Public Document.

Held, that the loss or destruction of a document not having been proved, secondary evidence was not admissible under clause C., sect. 65, of the *Indian Evidence Act.*

An anumatri-patra is not a public document within sect. 74, and if it were, the only admissible secondary evidence is a copy certified by a public officer under sect. 76.

APPEAL from a decree of the High Court (April 16, 1884) dismissing the Appellants' appeal and allowing the Respondent's cross-appeal from a decree of the Subordinate Judge of *Putna* (June 20, 1881), which gave to the Respondent a decree for a part of the properties sued for.

The facts are stated in the judgment of their Lordships.

* *Present:*—LORD WATSON, LORD FITZGERALD, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

J. C.

1887

KRISHNA KISHORI CHOWDRANI v. KISHORI LAL ROY.

Cowie, Q.C., and *Doyne*, for the Appellants.

Rigby, Q.C., and *Mayne*, for the Respondent, were not called upon.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

This question upon which the case must be determined is whether there was proof of the document alleged to have been executed by *Goluck Nath Roy* in the year 1840.

The Plaintiff claims to be entitled to half the estate which belonged to *Goluck Nath*. *Goluck Nath* died leaving only a widow and two daughters. The Plaintiff is the only son of one of those daughters, and would be, if there were no will disentitling him to the property, entitled to the half share which he seeks to recover in the action. But the Defendant in the action sets up that in a power to adopt which *Goluck Nath* executed in the year 1840 he devised, in the event of no adoption being made, the half share, which would otherwise go to the Plaintiff, to the other daughter and her son. The words relied on are these. After giving his widow power to adopt, he says: "God forbid if, without any son being begotten of my loins, I should die, and you also should suddenly die without having made"—the literal translation is "having delayed to make"—"an adoption, then my younger daughter *Roopmunjari*, and her son, that is my grandson by my daughter's side, shall become entitled to, and shall exclusively possess, all my above-mentioned zemindaries," &c. The question is, has it been proved that those words are contained in a document executed by *Goluck Nath*.

It is said that the original document was filed in the Collector's office when the widow, after the death of *Goluck Nath*, applied for mutation of names. It was unnecessary for the Collector, in deciding whether the name was to be changed from that of the deceased husband to that of the widow, to inquire into any subject except whether the widow was entitled to have her name substituted for that of her deceased husband. It was no part of his duty to inquire who, on the death of the widow, would be the reversionary heirs; and it is to be remarked that when she put in

her petition to the Collector for the mutation of names, although she said that her husband had given her power to adopt, she did not go on to say that in that document he had devised over the estate to the second daughter and her son in the event of her not adopting. The Collector, also, in adjudicating that the widow's name was to be substituted for that of her husband, does not allude to that portion of the document. He merely declared that it has been shewn to him; that the widow represents her husband; and that her name should be entered in the collectorate in place of that of her husband.

It is stated that *Goluck Nath*, after he had executed the document, notified to the Judge that he had given his widow power to adopt. Those proceedings are before the Court: but there is nothing in them to shew that when he spoke of having given his widow power to adopt, he ever mentioned the fact of his having devised over the estate to his second daughter and her son in the event of the widow's not adopting.

The original document is not produced, but the parties have endeavoured to give secondary evidence of it, and in order to let in secondary evidence they endeavoured to shew that the document was burnt in a fire. The learned Judge of the first Court, in dealing with this subject, does not go so minutely into the question as the High Court have done. He says: "The anumatipatra will relied upon by the Defendants is dated" so and so, "but the original deed was burnt up by setting fire in the *Cutcha Cutchery* bungalow of the deceased *Chundermoni*, and its loss was satisfactorily accounted for by the depositions of the Defendant's witnesses." That is all he says upon the subject. The High Court in dealing with that question go more minutely into it. They say:—"We have considered the evidence as to the loss of this document, and it by no means satisfies us. When the copy was filed in 1868 this account was not given of the loss of the original, and we think that if this were a true account, the fact of the loss by burning would have been stated at that time. In the Paper Book, in Appeal No. 260, there is a judgment in a suit, No. 31 of 1870, which contains a statement as to the loss of the document, and this was relied upon to shew that a different account was given on this occasion. We think we cannot accept

J. C.
1887
KRISHNA KISHORI CHOWDRANI v. KISHORI LAL ROY.

the recital of facts in the judgment as evidence of a different account having been given on a previous occasion. But we are of opinion that we may properly make the observation that the account of the loss by burning, now given, was not given in 1860." But, further, there is a very important remark which may be made in addition to that of the High Court. In the record to which they refer (it will be found also in this record), it is said:—"The Plaintiff has failed to produce the original will or anumati-patra: he has only produced a copy of an anumati-patra of 17th Magh 1246 as executed by *Goluck Nath Roy*, in favour of *Chundermoni*, and the Plaintiff's witnesses Nos. 2 and 3 have stated that the Plaintiff searched for, but could not find the original anumati-patra." Now if he knew that it was burnt, how could he produce witnesses to say that he had searched for it? He not only does not give the same account, but he gives an entirely different account. He says now that it was burnt. He said in a proceeding subsequent to the alleged date of the burning, that he searched for the document but he has not been able to find it.

The High Court then go on:—"Upon the evidence we think that the account now given is not entitled to credit, and we feel bound to say that the Defendant has not proved the loss of the original so as to entitle him to give secondary evidence of its contents."

Their Lordships are of opinion that the High Court came to a correct conclusion upon that point, and that being so, the loss or destruction of the document not having been proved, secondary evidence was not admissible under clause C., sect. 65, of the *Indian Evidence Act*. There are, however, cases under that Act in which secondary evidence is admissible, even though the original is in existence. One of the cases is under sect. 65, letter *e*. "When the original is a public document within the meaning of sect. 74;" and another under letter *f*, "When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in *British India*, to be given in evidence." But in either of those cases "a certified copy of the document, but no other kind of secondary evidence, is admissible." If then the anumatri-patra was a public document within

the meaning of sect. 74 of the Act, which in their Lordships' opinion it was not, no secondary evidence would have been admissible except a certified copy. Where is the certified copy? The document which is set out in the Record is not a certified copy. There is no certificate of any public officer that it is a true copy of a document contained in the office, see sect. 76.

Then again it is said that the Judge, on the trial, sent for the proceedings before the Collector's Court, and that they were sent up to him; and at page 218 of his record we find that there is what is said to be an authenticated copy of the document in the proceedings. But that document was not a certified copy, and there is no evidence whatever to shew that it had ever been examined by any witness with the original document, which was said to have been at one time in the Collector's office.

Their Lordships therefore, are of opinion that there was no sufficient evidence of the loss or destruction of the original, and no sufficient secondary evidence, within the meaning of the *Evidence Act.*

Even if parol evidence were admissible as secondary evidence, their Lordships cannot rely upon such evidence as was given in 1881, with reference to the contents of a document which had been executed forty years previously. The only witness who was an attesting witness says that he recollects a document being executed, but he cannot say whether it contained the words which amount to a devise over to the daughter and her son. There is no evidence on the part of the attesting witness that the document did contain a devise, and there is only the evidence of witnesses who can hardly be supposed to have known at the time, or, even if they did know at the time, to have recollected the contents of a document by which it is contended that the estate of this gentleman was alienated from him by the will of his grandfather.

Then again it was stated, that at the time of the making of the will, the second daughter's son was born, and that the child was in the lap of the mother when her father gave the power to his widow to adopt, and also devised his estate to the daughter and her son in case the widow should not adopt. From the contents of the document it appears that the testator was not

J. C.
1887
KRISHNA KISHORI CHOWDRANI v. KISHORI LAL ROY.

speaking of a son to be born, but of a son who was then actually in existence. From the evidence which was given, it appears to be clear that at the time *Goluck Nath* executed this document, giving his widow power to adopt, the child, *Anund Soonder*, was not in existence. The High Court have very carefully gone into the evidence upon that subject, and they have shewn conclusively that the child was not in existence at the time when the document is alleged to have been executed.

Looking, then, to all the evidence in the case, their Lordships are of opinion that the High Court, who gave a very carefully considered judgment, and weighed the evidence with great care, came to a right conclusion upon the evidence, that the will was not executed by *Goluck Nath*, and consequently that the Plaintiff is entitled to recover his half share, and that the judgment of the High Court ought to be affirmed.

Their Lordships will, therefore, humbly recommend Her Majesty to affirm the judgment of the High Court, and the Appellant must pay the costs of the appeal.

Solicitors for the Appellants: *Barrow & Rogers.*

Solicitor for the Respondent: *Sanderson & Holland.*

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SIMBHUNATH PANDAY AND OTHERS . . DEFENDANTS;

AND

GOLAB SINGH AND OTHERS . . . . . PLAINTIFFS.

J. C.*
1887
Feb 11, 26.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Hindu Law—Mitakshara—Joint Family Estate—Execution Sale of Father's Right and Interest—Intention of the Proceedings.

Where an execution sale relates to a Mitakshara joint family estate, and the father alone has been party to the proceedings, and it appears that his mortgage, the suit of the creditor, the decree and the sale certificate all purported to affect his right and interest alone:—

Held, that, whatever the nature of the debt, only his right and interest were intended to pass

Upooroop Tewari v. *Lalla Bandhjee Suhay* (Ind. L. R. 6 Calc. 749) distinguished

APPEAL by special leave from a decree of the High Court (June 27, 1883), reversing a decree of the Subordinate Judge of *Bhagulpore* (Dec. 5, 1881).

The object of the suit, which was instituted on the 18th of April, 1881, was to establish that the Appellants, by virtue of a purchase at a sale on the 7th of September, 1874, in execution of a decree which one of them, *Bhichook*, had obtained against *Luchmun Singh*, father of four of the Plaintiffs and husband of the fifth, had become entitled only to one-sixth part of the joint family property, which formed the subject of the suit, and which in its entirety consisted of a 4-anna share of an estate called *Kindwar*. The Plaintiffs sought to recover back possession of the remaining five-sixths from the Appellants on the ground that under the law of the Mitakshara by which the family was governed they were not responsible for *Luchmun's* debt inasmuch as it had been contracted only on his own account, and without the consent of the Plaintiffs.

The Plaintiffs prayed to have *Luchmun's* one-sixth share, con-

Present.—LORD WATSON, LORD FITZGERALD, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

J. C.
1887
SIMBHUNATH PANDAY v. GOLAB SINGH.

sisting of two pie and two krants of the whole, partitioned off, as the Defendants' share, and to have possession of the other five-sixths given back to the Plaintiffs with mesne profits, and their right as to certain kamat lands appurtenant to the lands in suit, of which they alleged they retained possession, confirmed.

The Appellants' contention was that the loan which they, through *Bhichook*, had made on bond to *Luchmun Singh* in September, 1865, was to obtain his release from arrest, and was to meet family necessities, and that the advance was made with the knowledge of the eldest son, the Plaintiff *Golab Singh*, who was then the only son who had attained majority, and that the two eldest sons, of whom the second had then attained majority, had, in August, 1869, agreed to a compromise of the Appellants' claim and suit, and to a decree in pursuance of it, under which the property in suit was then mortgaged to the Appellants. And that by virtue of the sale made in execution of that decree the whole interest of the joint family passed to the Appellants.

The Subordinate Judge held in effect on the material issues:—First, that when the loan was made and the bond for it was executed by *Luchmun Singh* in September, 1865, all his sons except the eldest were minors, and that the eldest son himself negotiated the loan, and that when the mortgage in respect of that loan and bond was executed in August, 1869, the two eldest sons of *Luchmun Singh*, then majors, consented to that mortgage, and that the third son subsequently, when he had come of age, consented to what had been done during his minority in these matters. Further, that the Plaintiffs, having failed to shew that the debt was contracted for any immoral purpose by their father, and being bound to pay his debts if not improperly contracted, were liable for the debt in question, and that their interests passed by the sale in execution, and he accordingly dismissed the suit.

The High Court (*Prinsep* and *O'Kinealy*, JJ.) were of opinion that the case was governed by the case of *Deendyal* v. *Jugdeep Narain Singh* (1), and that looking to the terms of the bond it was "clear that the obligation was simply on the part of the father."

(1) Law Rep. 4 Ind. App. 247.

J. C.
1887
SIMBHUNATH PANDAY v. GOLAB SINGH.

Doyne, for the Appellants, contended that the Subordinate Judge was right in holding that under all the circumstances of the case the entire interest of the family in the estate in question, and not *Luchmun's* share alone, was responsible for the debt in question and passed by the sale in execution. The debt contracted by the father was not of an immoral character and the sons were bound to discharge it. Besides, there was actual assent by the sons. The eldest was of age at the execution of the bond, and was a party to taking the loan. He and the second son assented to the mortgage. The third son also on coming of age ratified the arrangements which had been made during his minority for paying the debt contracted by his father. *Deendyal's Case* is distinguishable. There the creditor had in the first instance taken a mortgage and got a decree on the money bond. Here he has purchased the mortgaged property. There the creditor had shewn an intention to charge the father's share alone. Here the intention was to charge the whole estate, and accordingly the consent of the other coparceners had been obtained. Reference was made to *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (1): *Girdhari Lall* v. *Kantoo Lall* (2); *Hurdey Narain Sahu* v. *Rooder Perkash Misser* (3); *Nanomi Babuasin* v. *Modun Mohun* (4).

The Respondents did not appear.

1887
Feb. 26.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

This is one of the numerous cases relating to the amount of interest acquired by the purchaser at an execution sale where the sale relates to a joint family estate subject to the Mitakshara law, and the father of the family alone has been party to the proceedings. Like several of its predecessors it has been heard *ex parte*.

Luchmun Singh is father of the joint family. He has a wife and four sons. The family property consists of a share of mouzah *Kinduar* amounting to 1 anna 4 pie in extent. Other shares of

(1) Law Rep. 6 Ind. App. 99
(2) Law Rep 1 Ind. App. 321
(3) Law Rep 11 Ind. App. 26.
(4) Law Rep. 13 Ind. App. 1.

J. C.
1887
SIMBHUNATH PANDAY v. GOLAB SINGH

the mouzah were, when the transactions now in question took place, vested in other branches of the family who had become divided from *Luchmun*. The share of *Luchmun's* family was 4 annas. The Appellants, who were Defendants in the suit, claim the whole 1 anna 4 pie. The Respondents, the wife and sons, who were Plaintiffs, claim five-sixths of it as the shares which would come to them on partition.

On the 17th of September, 1865, *Luchmun* took a loan of Rs.219 from *Bhichook*, one of the Appellants, and executed a bond for payment in a month's time, with interest at 24 per cent., or, after the month, with interest at 48 per cent, In July, 1869, the bondholder sued *Luchmun*, and an agreement was made that *Luchmun* should pay Rs.590. 4, with interest at 24 per cent. in a given month, and by way of security should mortgage "his right and interest in mouzah *Kindwar*." This agreement is embodied in a decree of the Moonsiff of *Bhagulpore*, dated the 7th of August, 1869. The same decree goes on to direct that in the event of non-payment the mortgaged property shall be sold by auction for the realisation of the decretal money. In the year 1874 a sale took place in execution proceedings under this decree.

The certificate of sale bears date the 21st of December, 1874, and is as follows:—

"A petition being filed for execution of the decree of the Court of the Sudder Moonsiff of *Bhagulpore*, dated the 6th of August, 1869, in Case No. 494 of 1869 v. *Luchmun Singh*, of mouzah *Kindwar*, pergunnah *Bhagulpore*, judgment debtor, and for holding auction sale of the under-mentioned property, an istahar was issued according to the order of this Court, and the said property, after being advertised, was sold by auction on the 7th of September, 1874; and, accordingly, the right and interest which the judgment debtor had in that property was purchased at auction for Rs.625 by *Bhichook Nath Pandey*, inhabitant and proprietor of mouzah *Phoolwaria*, decree holder, who forthwith filed Court fee stamps of Rs.12. 8 poundage fee, and filed a receipt for the balance Rs.612. 8 out of his decretal money. Therefore, this certificate is granted to *Bhichook Nath Pandey*, decree holder, auction purchaser of the said property; and it is hereby notified, that whatever right, title, and interest the said judgment debtor

had in the said property, being extinguished from the 7th of September, 1874, the date of the sale, is transferred to *Bhichook Nath Pandey*, decree holder, and that this certificate will be held a valid document with reference to the transfer of the right, title, and interest of the judgment debtor.

"*Specification of Property.*

"The right and interest of the judgment debtor in 4 annas, out of 16 annas of mehal *Kindwar* (main and hamlet), tuppa *Chandipa*, pergunnah *Bhagulpore*, the towzi number of the entire mehal being 82, and the sudder jumma Rs.380. 8.

"Dated 21st December, 1874."

BENGAL SECRETARIAT LIBRARY

The purchaser was put into possession on the 12th of January, 1875, and he appears to have remained in the possession and enjoyment of the whole 1A. 4P. until this suit was brought on the 18th of April, 1881. There is no distinct evidence as to the value of the property, but in the plaint the value is stated for Court purposes at Rs.5,500, which the Defendant does not dispute in his written statement, though he objects to the insufficiency of the Court fee on the ground that the Plaintiffs sue to recover some kamat land worth Rs.2,292. 2. Their Lordships conceive that the Rs.625 paid must be much below the value of the entirety, if indeed it is not below that of the sixth share which *Luchmun* would take on partition.

The Subordinate Judge dismissed the suit. He held that the debt was not tainted with immorality, and that two of the sons had consented to the mortgage. But his principal ground appears to have been that he was bound by the decision in *Upooroop Tewari* v. *Lalla Bandhjee Suhay* (1), to hold that a mortgage of the right and interest of *Luchmun* passed the entirety of the family property.

On appeal the High Court reversed the decision of the Subordinate Judge, and gave the Plaintiffs a decree declaring that they are entitled to a partition of the family estate, and to obtain their respective shares under the Mitakshara law, the Defendant No. 1 being entitled to retain only the share of *Luchmun Singh*

(1) Ind. L. R. 6 Calc. 749.

J. C.
1887
SIMBHUNATH PANDAY v. GOLAB SINGH.

the father. They referred to the vernacular expressions used by *Luchmun* in his petition, on which the decree of the 7th of August, 1869 was founded, and which are rendered by the expression "right and interest;" and they thought that *Luchmun* clearly understood that he was dealing with only his own property in the estate. Further, they relied on the fact that the sons were not made parties to the execution proceedings, and to the treatment of that fact in *Deendyal's Case* (1).

Their Lordships cannot agree with the Subordinate Judge. Whatever part any of the sons may have taken in negotiating between *Luchmun* and *Bhichook*, there is no evidence whatever of their proposing to mortgage their own interests. The sons may have assented to what was done, but the question is, what was done? That must be answered by the documents.

Moreover if *Bhichook* relied on assent by the sons he should have taken care to make them parties to the execution proceedings. In *Deendyal's Case*, where the expressions used by the mortgagor were much more favourable to the conveyance of the entirety than they are here, the creditor's omission of the sons from the proceedings was made a material circumstance against him. And in *Nanomi Babuasin's Case* (2), where the decision was in favour of the purchaser, the same circumstance was recognised as being material when the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or to the father's coparcenary interest alone.

In the case of *Upooroop Tewary* Mr. Justice *Mitter* thought that the words "my proprietary share" in a mouzah were calculated to describe the entirety of the family property in dispute; and he distinguished them from the expression "right, title, and interest." In *Hurdey Narain's Case* (3) there was no conveyance, but a sale on a money decree. The only description was "whatever rights and interests the said judgment debtor had in the property," these were purchased by *Hurdey Narain*. The High Court held that nothing passed beyond the debtor's interest which gave him a right to partition, and which perhaps may for brevity be called his personal interest, and this Committee affirmed the decision.

(1) Law Rep. 4 Ind. App. 247. (2) Law Rep. 13 Ind. App. 1.
(3) Law Rep. 11 Ind. App. 26.

Each case must depend on its own circumstances. It appears to their Lordships that in all the cases, at least the recent cases, the inquiry has been what the parties contracted about if there was a conveyance, or what the purchaser had reason to think he was buying if there was no conveyance, but only a sale in execution of a money decree.

Their Lordships are sorry that they cannot follow the learned Judges of the High Court into their examination of the vernacular petition. But they find quite enough ground in the decree to express a clear agreement with them. They conceive that when a man conveys his right and interest, and nothing more, he does not *primâ facie* intend to convey away also rights and interests presently vested in others, even though the law may give him the power to do so. Nor do they think that a purchaser who is bargaining for the entire family estate would be satisfied with a document purporting to convey only the right and interest of the father. It is true that the language of the certificate is influenced by that of the Procedure Code. But it is the instrument which confers title on the purchaser. Its language, like that of the certificate in *Hurdey Narain's Case*, is calculated to express only the personal interest of *Luchmun*. It exactly accords with the expressions used in the decree of August, 1869, founded on *Luchmun's* own vernacular expressions, which the High Court construe as pointing to his personal interest alone. The other circumstances of the case aid the *primâ facie* conclusion instead of counteracting it. For the creditor took no steps to bind the other members of the family, and the Rs.625 which he got for his purchase appears to be nearer the value of one-sixth than of the entirety.

Their Lordships will humbly advise Her Majesty that the decree of the High Court should be affirmed and this appeal dismissed.

Solicitors for the Appellants: *Miller, Smith, & Bell.*

J. C.*
1887
Mar. 8, 9, 10.

PETTACHI CHETTIAR AND OTHERS. . . PLAINTIFFS;

AND

SANGILI VEERA PANDIA CHINNATHAMBIAR. . . . . } DEFENDANT.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Hindu Law—Mitakshara Joint Family—Sale of Right, Title, and Interest of the Father—Intention of Contract.

Case in which it was held that what was intended to be sold and bought at an execution sale was the right, title, and interest of the father of a joint Hindu family in the joint estate. Even if there were any ambiguity in one of the sale proclamations the purchaser by ordinary inquiry could easily have learnt the truth, and he was benamee for the execution creditors who were affected with full notice of all the proceedings.

APPEAL from a decree of the High Court (Jan. 17, 1882), affirming a decree of the District Court of *Tinnivelly* (March 18, 1880), which dismissed the Appellants' suit with costs.

This suit was brought in November, 1877, by the Appellants, who claimed as transferees of one *Subramania Moodely* to recover the zemindary of *Sivagiri*, which was purchased by the latter at an auction sale in 1874 in satisfaction of various decrees of the District Court of *Tinnivelly*. All the decrees had been passed against the late zemindar of *Sivagiri*, father of the Respondent, and the zemindary had been attached under them during his life, and continued so under attachment up to and at the time of his death, but the actual sale took place after his death. Both Courts found that nothing passed under the sale but a right to recover the rents due and unpaid at the death of the late zemindar. The Plaintiffs claimed that the right to the whole zemindary passed to the auction purchaser.

The defence was that the debts were not contracted for the benefit of the zemindary, and affected only the life interest of the late zemindar; and that what was sold at auction was in substance the arrears of rent, amounting to Rs.39,000, which were

* *Present*:—LORD WATSON, LORD FITZGERALD, and SIR BARNES PEACOCK.

then due to the late zemindar up to his death, and nothing more.

The facts are sufficiently stated in the judgment of their Lordships.

Mayne, and *Shepherd*, for the Appellants, contended that they were entitled under their purchase to the whole zemindary. The late zemindar had an absolute title to it; it was saleable even if ancestral estate by the Court to satisfy the debts for which it was attached; the Court was entitled and bound to sell every interest which was capable of sale in execution; and the entire zemindary, with all the zemindar's rights, was duly attached and remained under attachment up to his death. Even if the notification issued during his life contained any limitation of the interest to be sold, no such limitation was contained in the later notification or in the sale certificate. At the actual sale after his death the Court was bound to sell and did sell everything which could have been sold under the later notification, which comprised the whole estate. The legal operation of such sale could not be affected by any misapprehension on the part of the Court or of the purchaser as to what really passed. The sale was the sale of the creditors, and they intended to sell the whole estate, which they had previously seized in execution. [LORD WATSON:—The right, title, and interest were sold, and the question is what they were.] Sect. 249 of Act VIII. of 1859: *Girdhari Lall* v. *Kantoo Lall* (1). [LORD WATSON:—The questions are what did the Court intend to sell and what did the purchaser understand that he bought.] Prior to that is the question what had the Court the right and duty to sell, and is the purchaser prejudiced by any mistake in the mind of the Court as to what was being sold. Under sect. 249 of Act VIII. of 1859 the parties take notice that the Court sells everything that it can sell. The purchaser should satisfy himself as to what the Court was asked to sell and had a right to sell, and unless the proclamation limits it he bids for the whole estate that the Court has power to sell. See also sects. 264 and 263. Besides, the son here had no interest. The property came to the late

(1) Law Rep. 1 Ind. App. 321.

J. C.
1887
PETTACHI CHETTIAR v. SANGILI VEERA PANDIA CHINNATHAMBIAR.

zemindar as a maternal grandson of the last holder. In an estate so derived, though it is not self-acquired, yet the son does not take a vested interest on his birth: *Pitam Singh* v. *Ujagur Singh* (1); *Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar* (2). [SIR BARNES PEACOCK:—But was there not a brother in this case.] Yes; but there was nothing to shew that he was alive. [SIR BARNES PEACOCK:—We cannot presume his death. The estate was impartible, and as against the brother the father had only a life interest.]

Graham, Q.C., and *G. P. Johnstone*, for the Respondents, were not called on.

1887
March 10.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This is an appeal from a decision of the High Court at *Madras* affirming the decision of the Lower Court upon the first issue in the suit. That issue was: "What is the nature of the right, title, and interest acquired under the sale certificate issued by this Court to the purchaser?"

The first Court, after considering all the facts and the evidence in the case, came to the conclusion that all that was offered for sale, and all that was purchased under the sale was the interest which the father of the Defendant had at the time of his death.

The High Court stated the facts very fully; they considered them very maturely, and they reviewed them very carefully, and they came to the conclusion that the decision of the Judge of the first Court was correct.

There were two concurrent findings of the Court. It may be said that they were not upon a mere question of fact, but on a question of mixed law and fact. As regards the fact, both Courts came to the conclusion that what was offered for sale, and what was intended by the purchaser to be purchased, was the right and interest which the father had at the time of his death.

There is no doubt that when the execution was issued, and the

(1) Ind. L. R. 1 Allah. 652.

(2) Ind. L. R. 3 Madras, 170; and on appeal, Law Rep. 9 Ind. App. 128.

attachment made, in the time of the father, the proclamation expressly stated that all that was to be sold was the life interest of the father. In the record it will be found that a petition was put in by the creditor in one of the suits, praying that that notification might be altered. He said: "I pray therefore that in conformity with the above sections of the Civil Procedure Code, a fresh advertisement may be made expunging the words 'during his lifetime.'" Those words having been put into the proclamation that nothing was to be sold except the interest which the father had in his lifetime, one of the creditors asked to have those words expunged. But the Court made this order: "The advertisement is that the right, title, and interest of the said Defendant in the estate during the term of his life be sold, the judgment having distinctly declared that only such is liable for this decree debt. This prayer cannot therefore be granted." At that time, in the father's lifetime, it was expressly decided by the Judge that what was intended by the decree to be sold, and what could be sold under the decree, was only the interest of the father during his lifetime. The sale was postponed at the instance of the creditors, in consequence of the father's illness. They said: "As the estate is to be sold only for the father's interest during his lifetime, the sale will not fetch so much during his illness as it would if he were in a better state of health," and therefore they asked to have the sale postponed in consequence of the illness of the father. The sale was postponed. If it had taken place during the lifetime of the father, the purchaser would have obtained all that the father was entitled to during his life, and that only, and he would have been entitled to possession of the estate during the father's lifetime, and to receive the rents which were then in arrear.

The father died, No fresh attachment was made. The sale was to take place after the father's death upon the attachment which had been made during his lifetime. The proclamation stated that the property was to be sold only for the interest of the father; but after the father's death, as it appears, the Court allowed the son, notwithstanding the attachment (because it was only for the life interest of the father) to take possession of the estate, stating that all that was to be sold was the life interest of

J. C.
1887
PETTACHI CHETTIAR v. SANGILI VEERA PANDIA CHINNATHAMBIAR.

the father, namely, not then the right to the possession of the estate, but the right to receive the rents in arrear.

The property was put up for sale, and it is said that the proclamation was ambiguous, that it did not state that the sale was merely of the life interest of the father, but that it was a sale of only the interest of the father. And it is contended on behalf of the Appellants that by the change of the terms the purchasers necessarily thought that they purchased the whole interest in the estate. But, even if the fresh proclamation was ambiguous, the purchasers, if they had made the ordinary inquiry which they ought to have made, would have discovered that all that was intended in the first proclamation was the life interest of the father in the property which had been attached, and that the same interest was intended to be sold under the second proclamation.

The purchaser purchased for a small sum, about Rs.12,000, but he had not the money to pay. He paid merely a deposit. He subsequently conveyed to the creditors themselves. There can be no doubt in their Lordships' minds, that when he purchased he was purchasing benamee for those creditors, and although they might have purchased in their own names, they did not do so, because, if they had done so, they would have purchased, having themselves the knowledge of all that had previously taken place. They therefore allowed the property to be purchased in the name of a clerk of one of the execution creditors in order that it might appear that it was purchased by a man who had no notice of what had taken place previously.

It is unnecessary to go into the question whether the estate came from the paternal ancestors, or in other words whether it was ancestral estate or not. The learned counsel, in a very ingenious argument, endeavoured to shew that a difference existed in consequence of its being an estate which came from the maternal and not from the paternal grandfather, and consequently that it was not ancestral estate. But that makes no difference in the present case. If the whole estate could have been put up for sale it was not put up. It is not a question of what the Court could have done, or what they ought to have done, but what they did, what was put up for sale, and what was purchased. If what

was put up for sale was merely the estate which the father had in his lifetime, then what the purchaser purchased was only that interest.

The High Court having carefully reviewed the whole of the evidence, and the whole of the documents, came to the conclusion that the first Court was right in finding that all that was intended to be sold, and all that was sold was the life interest of the father, and not the whole interest in the zemindary.

Their Lordships entirely agree with the conclusion at which the High Court has arrived, and they will therefore humbly advise Her Majesty to affirm the decree of the High Court, and the Appellant must pay the costs of the appeal.

Solicitors for Appellants: *Burton, Yeates, Hart & Burton.*
Solicitors for Respondent: *Lawford, Waterhouse & Lawford.*

WAGHELA RAJSANJI . . . . . DEFENDANT;

AND

SHEKH MASLUDIN AND OTHERS . . . PLAINTIFFS.

J. C.*
1887
March 2, 3.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Guardian and Ward—Personal Liability cannot be imposed on the Ward—Powers of Guardian—Ahmedabad Talukdar Act (VI. of 1862), *s.* 12.

Where a guardian covenanted for herself and her infant ward to indemnify the purchaser of the ward's estate against any claim by the Government for revenue:—

Held, that it was beyond the power of the guardian to impose a personal liability on the ward.

Held, further, that so far as the guardian purported to charge other estates of the ward to answer the covenant, the charge, whether or not it was *ultra vires*, was void within the terms of sect. 12 of the *Ahmedabad Talukdar Act* (VI. of 1862).

APPEAL from a decree (March 1, 1883) which partly affirmed and partly varied a decree of the Subordinate Judge of *Ahme-*

* *Present*:—LORD WATSON, LORD FITZGERALD, LORD HOBHOUSE, and SIR BARNES PEACOCK.

J. C.
1887
WAGHELA RAJSANJI v. SHEKH MASLUDIN.

dabad (March 17, 1880). The facts are stated in the judgment of their Lordships.

The questions in the appeal were as to the liability of the Appellant, as well personally as out of certain immoveable estates, under a covenant contained in a deed of sale, executed by his mother on his behalf during his minority, of certain lands to the Plaintiffs' father and grandfather, both since deceased, to pay certain sums, aggregating Rs.12,000, which the Plaintiffs' father after that sale had to pay to Government for revenue, together with interest.

The Respondents were the heirs of *Shekh Gulam Mohidin*, who purchased the said estates from the Appellant and his mother in 1858. The covenants warranted the property to be rent free, and indemnified the purchaser against all loss he might suffer from breach of the warranty in respect of such assessment by the Government as was decided by the Courts to be valid. The suit was founded upon the covenant, and claimed damages for its breach. The Appellant pleaded that the deed of sale was invalid, and that any operation it might otherwise have had was barred by the *Bombay Act*, VI. of 1862. These contentions were set aside by both Courts, but they varied in the mode in which they assessed the damages.

The First Court held that the Plaintiffs were entitled to recover Rs.12,000, together with a further sum of Rs.750, paid by the Plaintiffs' father in respect of local cesses, without interest, from the Appellant personally and from his moveable properties, but not from the mortgaged immoveable estates in question.

The High Court, on the appeal and cross-appeal of the parties, disallowed the claim of Rs.750 in respect of certain local cesses, but allowed the claim of Rs.12,000 in respect of revenue, with interest, and declared that amount to be recoverable from the Appellant's property generally, as well as from him personally.

The first judgment of the High Court was delivered on the 22nd of March, 1881. After setting out the covenant sued on, and disallowing the sum paid by *Mohidin* for local cess, as not "*ejusdem generis* with ordinary land revenue," the judgment proceeded as follows:—

"The Defendants have contended that the deed of sale of 1858

is unsustainable against one who was a minor at the date of its execution; but this contention is not open to the Defendants, having been *res judicata* in Regular Appeal 55 of 1872. It is true that the *Talukdari Act* opens with a recital that talukdari estates in *Ahmedabad* are 'now only held on leasehold tenure, determinable at the pleasure of Government, and also that such estates' could not and cannot be lawfully charged, encumbered, or alienated." It has been, however, already pointed out by the High Court that such a recital in an Act or Statute is not conclusive (see 9 Bomb. H. C. Rep. 215, 216), and that it is scarcely consistent with the concluding portion of sect. 7 of the Act. It is substantially displaced by the report of Mr. *Peile*, published by Government since the passing of the Act (see No. CVI. of the New Series of Selections from *Bombay* Government Records). In fact the recital is notoriously contrary to historical truth. The annual kabulayats, given to Government by the talukdars, were merely arrangements for payment of the annual assessment on such of the estates as were properly assessable. The recital was manifestly introduced as a species of justification of the arbitrary manner in which creditors and incumbrancers are dealt with by the Act (see especially sects. 3, 10, 16). The decision in Regular Appeal 55 of 1872 is a practical contradiction of the truth of the recital. That recital is on a par with the recital in *Madras Regulation* 31 of 1802, that the actual proprietary right of lands of every description belonged to Government, dealt with by Her Majesty's Privy Council in *Collector of Trichinopoly* v. *Lakkamani* (1), which case must be regarded as equally fatal to the like recital in *Bombay Regulation* III. of 1814.

They further contend that all claims under the covenant for payments of land revenue are barred by the *Bombay Act* VI. of 1862, "for the amelioration of the condition of talukdars in the *Ahmedabad* Collectorate, and for their relief from debt." In support of this proposition, sects. 1, 2, 3, 4, 5, 9, 12 and 16 are relied upon. It is true that the main object of that Act was to relieve such of the talukdars of *Ahmedabad* as are, under its 1st section, brought under the operation of the Act, from debt. But it is not quite exclusively devoted to that object. It also indicates

(1) Law Rep. 1 Ind. App. 282, 304, 308.

J. C.
1887
WAGHELA RAJBANJI v. SHEKH MASLUDIN.

an intention that their creditors should, to a certain extent at least, if not in full, be paid. This is apparent from sects. 8, 9, 10 and 11. The 8th, 9th and 10th sections lead us to conclude that the debts and liabilities intended to be dealt with under the Act are such as might be the subject of a claim under sect. 8. Such a claim should ordinarily have been sent in within three calendar months after the notification mentioned in sect. 8, or, under special circumstances, within the further period of nine calendar months from the expiration of the three calendar months. The Defendant *Rajsangji* and his estates were, by a declaration under sect. 1, brought under the operation of the Act before the 20th of August, 1863. It is admitted that the non-wanta land, which passed to the vendee under the deed of sale of 1858, was not assessed until Samvat, 1927 (A.D. 1870–71), some six or seven years after the issue of the notification under sect. 8. Therefore the Plaintiffs or their ancestor had not at the time of the notification, or at any time within twelve months afterwards, any claim which they could have preferred to him against *Rajsangji* or his estates, or which could have been included by the Settlement Officer in the scheme for the settlement of the Defendant *Rajsangji's* debts and liabilities, to be prepared by that officer and submitted to the Governor in Council, or which could be described in the language of sect. 16 as existing at the time of the declaration made under sect. 1. The claim under the covenant in respect of land assessment was only then at the utmost a contingent claim. It was impossible to "say at that time whether the Government of that day, or of any future time, would assess or attempt to assess any portion of the lands sold in 1858, or that any liability under the covenant in respect of land assessment would ever accrue. The most skilful actuary could not have estimated in figures the probability of the occurrence of the event which would give the claim.

"We prefer not to give any final opinion as to the operation of sect. 12, more especially as regards the landed estates of the talukdar, the Defendant *Rajsangji*, until the talukdari Settlement Officer has been made a party to the suit. The period of management of the estate has not yet been notified as terminated, and it is not desirable to decide in his absence, or at least with-

out giving him an opportunity of being heard in this Court, whether or not the liability which has accrued under the covenant binds the lands and villages named in the deed of sale as securities for the performance of the covenant. It appears that he did apply to the Subordinate Judge to be made a party to the suit; but that request was refused. We think it ought to have been granted."

The talukdari officer having been made a party, as directed, the case came up again for argument before another Division Bench, which, on the 1st of March, 1883, delivered the following final judgment:—

"We concur in the opinion expressed by *Westropp*, C.J., and *Birdwood*, J., that the 'liabilities' with which the first ten sections of *Bombay Act* VI. of 1862 were intended to deal, were liabilities which at the time of the declarations mentioned in sect. 1, were not merely contingent, but could be made the subject of an immediate claim. Such was not the liability which the Plaintiff now seeks to enforce. The only remaining question is, whether it is such a liability as is contemplated in sect. 12? We think that it is not. A careful consideration of the whole section leads us to the conclusion that the word 'incur' is used in its proper sense of 'run into,' and implies an act done by the talukdar during the period of the management. The section seems to be intended as a warning to money lenders, that if during the period of management they lend money to the talukdar they must be content with his personal security. The case with which we have now to deal, viz., that of a debt or liability to which the talukdar has became subject during the period of the management, in consequence of an event which could not be foreseen with certainty at the commencement of that period, is a case which does not appear to have presented itself to the mind of the Legislature, and must be treated as a *casus omissus* in the Act. Under this view there is nothing in the Act to prevent us from giving effect to the contract between the parties, and we therefore enter judgment for the Plaintiff for the sum of Rs.12,000, with interest at 9 per cent. per annum

J. C.
1887
WAGHELA RAJSANJI v. SHEKH MASLUDIN.

from the date of each payment composing that sum up to date of this judgment, and 6 per cent. to date of execution, the amount to be recovered from the Defendant *Rajsangji's* property, generally, as well as from him personally. Decree amended accordingly, Plaintiffs' costs on the Defendant *Rajsangji*. The talukdari Settlement Officer to pay his own costs. The amount of interest to be calculated in execution."

Doyne, for the Appellant, contended that the benefit of the covenant did not pass to the Respondents, who were heirs of the purchasers, the covenant being personal to the latter. It was not binding on the Appellant, who was a minor at the time. It was a very onerous covenant, and not for his benefit. It was beyond the power of the guardian to impose a personal liability upon him. The Respondents' claim, moreover, was barred by sects. 8 and 9 of *Bombay Act* VI. of 1862, or by sect. 12. Further, having regard to the terms of sect. 20, the High Court was wrong in making the Appellant's estates, now in charge of the talukdari officer, and to which the Appellant on the expiration of that officer's management will be entitled as absolute proprietor, liable to the Respondents' claim.

Mayne (*Wilkin* with him), for the Respondents, contended that the deed of sale was binding on the Appellant, and that he was liable under its covenants executed by his guardian: *Hunoomanpersaud Panday* v. *Mussumut Babooee Munraj Koonweree* (1). There is nothing in Act VI. of 1862 to bar their effect. The charge on the other talukdari estates was valid, and effect should be given to it. The land included in the deed of sale was diminished in quantity on the assumption that it was rent free. Instead of more land being included in the deed, land outside the scope of the sale was rendered liable to a charge in case the land sold should turn out to be subject to rent. The liability to this charge was the price of its exemption from the deed of sale.

Counsel for the appellant was not called to reply.

(1) 6 Moore, Ind. Ap. Ca. 393.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

In this case the Appellant, who was the Defendant in the Court below, is the talukdar of *Ahmedabad*, and the Plaintiff, who is the the Respondent—there has been some change of title since, but throughout this judgment the Plaintiff will be referred to as a single person—brought a suit to enforce a covenant which was entered into in the year 1858 by the Defendant's mother and guardian on his behalf when he was a boy eleven years old. That covenant arose in this way. The Plaintiff was a creditor of *Sewsangji*, the Defendant's father, and the debt appears to have been one for which the talukdari family estate might be made liable. Under those circumstances, in 1858, an account was stated of the amount due to the Plaintiff, which was found to be Rs.35,001. In lieu of enforcing that debt by decree and execution, he took a conveyance from the mother and guardian, *Bai Ramba*, of a certain extent of the family land—the exact extent does not matter now. The validity and propriety of that transaction was challenged by the Defendant after he came of age. It was the subject of a suit in the year 1868, and the result was to establish that the transaction was a valid one *bonâ fide* entered into by the guardian, and within the range of her powers. There is therefore no question in this suit as to the propriety or expediency of the sale of 1858; but the question is as follows. The family claimed to hold the conveyed land rent free, and the guardian conveyed it as rent free, and their Lordships must assume that it was valued on that basis. The purchaser was not content with the assertion of the family that in point of fact they paid no rent, though that seems to have been the fact, but he took a covenant from the guardian to indemnify him in case the Government should enforce their claim to receive rent out of the estate, and that covenant is framed so as to bind both the guardian and the infant, who was nominally by his guardian a party to the deed. That the covenant bound the guardian there can be no doubt, but the question is whether it could bind the infant talukdar. Unfortunately neither of the Courts below addressed themselves to this question, because they held that it had been already decided by the decree made in the prior suit.

J. C.
1887
WAGHELA RAJSANJI v. SHEKH MASLUDIN.

Looking at the prior suit, their Lordships find that it was a suit to impeach the whole sale, on the grounds, first, that it was fraudulent, and, secondly, that it was beyond the powers of the guardian and manager. No question whatever was raised as to the validity of the guardian's covenant as against the infant. In fact it is impossible that that covenant could have come into question, excepting as a subsidiary argument to shew that the deed was an improper one, and then the curious result would be this: That the more clearly that covenant was void in law, the less would be the force of the argument founded upon it. In point of fact, neither in the pleadings nor in the decree in that suit can it be discovered that anybody paid any attention to the point which is now under consideration. Their Lordships, therefore, must hold that to be an open point in the present suit.

Now it was most candidly stated by Mr. *Mayne*, who argued the case on behalf of the Respondent, that there is not in Indian law any rule which gives a guardian and manager greater power to bind the infant ward by a personal covenant than exists in English law. In point of fact, the matter must be decided by equity and good conscience, generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances. Their Lordships are not aware of any law in which the guardian has such a power, nor do they see why it should be so in *India*. They conceive that it would be a very improper thing to allow the guardian to make covenants in the name of his ward, so as to impose a personal liability upon the ward, and they hold that in this case the guardian exceeded her powers so far as she purported to bind her ward, and that so far as this suit is founded on the personal liability of the talukdar, it must fail.

That however is not the whole of the covenant. By way of security for its performance the deed gives a charge upon the other talukdari estates, some specified wanta lands and giras lands, and the other property generally. Mr. *Mayne* reasoned on that in this way. He said the land was valued as rent free; if it had been valued as subject to rent, the creditor would have insisted on having so much more of the land; therefore family land is saved by valuing as rent free the land actually taken,

and it was not only reasonable but within the compass of the guardian's powers to deal with the remaining family land of which she was manager, so as to make it a security to the creditor against his loss by the Government exacting rent. The argument is one which is worthy of great consideration, but their Lordships do not wish to pronounce any opinion on it or to subject it to any minute examination, because assuming it in favour of the Respondent to be a sound argument, they are clearly of opinion that so far as regards the talukdari estate—and that is now the only part of the case which they have not dealt with—an answer to it is to be found in the terms of the *Ahmedabad Talukdari Act*, Act VI. of 1862.

In the opinion of the Subordinate Judge, the Defendant in the suit was liable personally, but his estate could not be charged on account of the terms of the 12th section of the *Talukdari Act*. In the opinion of the High Court he was liable both personally and as regards the talukdari estate, and their decree is founded upon that opinion.

The object of the *Talukdari Act* was to maintain the status and order of talukdars, which the Government as a matter of policy thought it important to maintain. They were a class of gentlemen who had been living beyond their means; they had got very much embarrassed, and they did not perform those political objects which the Government thought of great importance to have performed in various parts of the country. Many Acts of the kind have been passed relating to different parts of the country, and all with the same object. The method adopted was, where a talukdari estate had reached a certain pitch of embarrassment, to make a declaration placing it under the management of an officer who was to manage for a term of years which might extend to twenty years. During that time he was to maintain the talukdar and his family, to pay all the expenses of the management, and then to apply the surplus to liquidate or settle the debts of the talukdar, in liquidation or settlement of the debts and liabilities to which at the time of the declaration the talukdar was subject, either personally or in respect of his landed estates. But at the end of the twenty years the estate was to be restored to the talukdar absolutely free of incumbrance

J. C.
1887
WAGHELA RAJSANJI v. SHEKH MASLUDIN.

excepting the Government tax. If the debts amounted to more than the surplus rents during the term would suffice to pay, those debts were not to be paid at all. It may have been a very arbitrary way of dealing with creditors, but that was the policy of the Act, and in construing the Act it must be remembered that it recites that the talukdari estates could not be lawfully charged, encumbered, or alienated. It is said that that recital was wrong. The High Court state it to be wrong, and they state moreover that it was put in merely as a justification to the Government for dealing in the summary manner in which they did with the creditors' rights. All that may be true. It may be true that the statement of the law is wrong, and the motive assigned may be true for aught their Lordships know. But supposing it is, it must be remembered that that was the idea in the mind of the Legislature, and all the provisions affecting creditors must be construed with reference to that idea, under which every benefit given to the creditor out of the talukdari estate would be in the nature of an indulgence, because he got something which he could not enforce by law.

Before examining what the enactments actually are, it would perhaps be convenient to state the order of events. The Defendant attained his majority in August, 1863, and the order placing his estate under management was made very soon afterwards. The exact date does not appear, but it was towards the end of 1863. The Government claimed rent against the Plaintiff in respect of the estate that he had bought in the year 1871, and this right to rent was finally established by decree of the High Court about the year 1875. At all events the claim was made and fully established during the period of management of the talukdari officer, so that the dates lead up to this result, that owing to the liability which was incurred in the deed of 1858, the Plaintiff had a claim measurable in money against the Defendant, perhaps as early as the year 1871, but at all events between then and 1875. It is not necessary to be more exact in the dates.

Now what does the Act provide? The preamble and the first nine sections deal with what they call existing debts and liabilities, and they deal with them in a very summary way. All processes by which any of them could be enforced are stopped, and in lieu

of those processes, the creditors have only the indulgence which has just been mentioned, of receiving the surplus rents for a term of years. Sect. 9 enacts that: "Any debt or liability of the talukdar other than as aforesaid;" (those words of exception may be dropped out for they only refer to Government claims) "to which he is subject either personally or in respect of the said landed estates existing at the time of the said declaration by the Governor in Council;" (that is the order subjecting the estate to management) "not duly notified to the said officer or officers," within a time specified "shall and is hereby declared to be for ever barred." Then sect. 12 says that any debt or liability, with the same exception, "which may be incurred by the talukdar either personally or in respect to his said landed estates or any part thereof, during the period of such management as aforesaid, shall not be enforcible in any manner whatever, either during or subsequently to such period of management, against his landed estates or any part thereof." Here we have an Act designed to set up the order of talukdars in an unembarrassed state, and to restore them their land within a period of, at most, twenty years, and dealing first with debts and liabilities existing at the commencement of the period of management, and secondly, with debts or liabilities incurred during the period of management. In such an Act their Lordships think it impossible to come to any other conclusion than that it was intended to deal with all debts and liabilities which could possibly impose a charge on the talukdar at the end of twenty years, and that to strain words from their literal ordinary meaning for the purpose of shewing that the liability now in dispute is one which does not fall within the compass of that Act, is an erroneous construction of the Act.

The High Court have given the Plaintiff a decree on this ground, that the debt that he claims does not fall into the first class of debts and liabilities because it was not existing when the period of management commenced, and that it does not fall within the second class because it was not incurred during the period of management. The result is this, that because when the management commenced there happened to be no means of reducing the liability into a claim measurable in money, and because the talukdar did not, during the period of management,

LEGAL SECRETARIA

J. C.
1887
WAGHELA RAJSANJI v. SHEKH MASLUDIN.

do some voluntary act to incur a fresh liability; therefore at the end of twenty years a great burden remains upon the estate. Their Lordships think that is not only contrary to the policy of the Act, but a departure from the obvious literal plain construction of the words. It may be true, and their Lordships think it is true, that when the management commenced the liability was not one that was measurable in money. It may not have been the subject of a claim against the estate, though that point would seem to depend on the nature of the rules made by the Governor in Council for the liquidation of debts. But it does not follow at all that it was not a liability which sect. 9 was calculated to bar. All liabilities were to be notified, and even if there were any so situated that the creditor could get nothing, the intention of the Legislature to bar every liability that existed then is, as their Lordships think, a plainly expressed intention.

Then as to sect. 12, the debt must have been incurred at some time, otherwise it could not be recovered. When was it incurred? According to the reasoning of the High Court it never was incurred. There was no debt when the period of management commenced, and no debt was incurred afterwards, because there were proceedings to which the talukdar was no party which converted the liability into a money claim. Their Lordships think that that is not the meaning of the word "incurred." It is not the common meaning of the word "incurred." Incur means to run into, no doubt, but it is constantly used in the sense of meeting with, of being exposed to, of being liable to; and in that sense the talukdar did incur debt. The liability was inchoate in the year 1858, and it reached its maturity some time between 1871 and 1875. If it was not a liability existing in 1863, when the period of management commenced under sect. 9, then it must be either a debt or liability incurred during the period of management. It is not necessary to decide under which section the case falls. Their Lordships incline to think that it falls under sect. 9, but they are quite clear that if it does not fall under sect. 9, it must fall under sect. 12. In either case the Act is sufficient to relieve the talukdari estate, which is the only point in question at this moment.

The result is that their Lordships think that the High Court

J. C.
1887
WAGHELA RAJSANJI v. SHEKH MASLUDIN.

ought to have reversed the decree below, and to have dismissed the suit with costs, and they will humbly advise Her Majesty to make that decree. The Respondent must pay the costs of this appeal.

Their Lordships are sorry to find that this record contains what they so often observe upon, namely, an enormous mass of matter which could not by any possibility be of use upon this appeal. They would wish to call the attention of the Courts in *India* again to that circumstance, in the hope that they may find some remedy against that which is a serious mischief in increasing costs.

Solicitors for the Appellant: *Walker & Whitfield.*
Solicitors for the Respondents: *Thomas & Hick.*

J. C.*
1887
March 10, 11.

ANANGAMANJARI CHOWDHRANI AND OTHERS . . . . . } PLAINTIFFS;

AND

TRIPURA SOONDARI CHOWDHRANI AND OTHERS . . . . . } DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Evidence—Issue as to Identity of Land re-formed—Possession—Prescription.

Upon an issue whether certain chur land was a re-formation on the Plaintiffs' land or on the Defendants', evidence was given tending to prove possession thereof by the Plaintiffs for a considerable period prior to their ouster by the Defendants.

The first Court found this issue of identity in favour of the Plaintiffs; the second held that the Plaintiffs had shown a title by adverse possession; the High Court remanded the case for a decision by the second Court on the issue of identity.

On remand the second Court affirmed the finding of the first. In special appeal the High Court held there was no evidence on which such finding could be arrived at, on the ground that evidence of subsequent possession was not receivable as evidence of previous identity:—

Held, that this was error, possession being established for a period of years, *presumitur retro.*

APPEAL from a decree of the High Court (April 3, 1882), reversing a decree of the District Judge of *Putna* (April 12, 1881), and dismissing the suit of the Appellants.

* *Present*:—LORD WATSON, LORD FITZGERALD, and SIR BARNES PEACOCK.

J. C.

1887

ANANGAMANJARI CHOWDHRANI v. TRIPURA SOONDARI CHOWDHRANI.

The facts are stated in the judgment of their Lordships.

The grounds upon which the case was remanded, as therein stated, by the High Court, appear in the judgment of the 20th of March, 1880 (*Morris* and *Prinsep*, JJ.), the material passage in which is as follows:—

"It is urged that the Plaintiffs never claimed the lands in suit by reason of adverse possession for upwards of twelve years. What they claimed was, as defined in the issue, whether the lands in suit were a re-formation on the site of lands originally demarcated as appertaining to their and the *pro formâ* Defendants' 13½ annas separate share. It was not their case that they occupied and held the lands in suit for so long a time as to create a title by prescription, but that the lands formed a portion of their original estate, and that they had been dispossessed from them by the Defendants in the year 1873.

"It is further contended that the Judge has not formed an independent opinion on the evidence in the case, but has erroneously allowed himself to be guided by the judgment of the Lower Court upon it, and has thereby abdicated his functions as Appellate Court; also that although the Judge adopted the conclusion arrived at by the Lower Court, yet, as appears from the 10th paragraph of his judgment, he by no means concurs in the estimate which the first Court forms of the evidence of the witnesses of either side. On the contrary, the Judge expresses a decided opinion that on both sides the witnesses have given false evidence, and that the doubt in his mind is 'on which side the bulk of the lying has taken place.' It is in consequence of this doubt that, following what appears to him to be the principle laid down in the case of *Shetabdee Biswas* v. *Molamdee Mundul* (1), he declares himself justified in following the decision of a properly constituted Court, whose decision is not shewn to him to be erroneous.

"It seems to us that there is much force in both of these contentions. The Plaintiffs never laid claim to the land by right of prescription, nor was it their case, as the Judge puts it, that they occupied the land in suit as a re-formation of a diluviated portion of their 13½ annas land, and that for a sufficient length of time

(1) 25 Suth. W. R. 30.

to confer title upon them, even supposing that before diluviation the lands were lands of the 2½ annas demarcation. It is apparent that the Judge has no definite opinion of his own as to whether the lands in suit originally appertained to the 13½ annas share or to the 2½ annas share, and which party has the best title in them. What he is willing to decide, and that not upon his own independent judgment on the evidence, is, that whether the lands in suit originally fell within the 2½ annas share of the Defendants or not, they have as a re-formation on their old site been so long in the possession of the Plaintiffs as to confer upon them a title by prescription. This, however, was not the issue which he was called upon to decide, and we agree in the argument that has been addressed to us, which is in conformity with the principle laid down in the case of *Shiro Kumari Debi* v. *Govind Shaw Tanti* (1), that no party can claim a title by prescription unless he has set it up and put it in issue against his adversary. He cannot, if he claims under a specific title and fails to prove it, fall back upon a totally different title to that which he originally set up. Moreover, we are not satisfied with the manner in which the Judge has dealt with the evidence. If the Judge cannot agree with the first Court in believing the witnesses of the Plaintiffs to be the witnesses of truth, he is not justified in accepting the conclusion of that Court, because he has, as he says, 'spent many weary hours over the written record of evidence, vainly trying to find some point in it which would enable him to form a clear opinion of his own as to where the truth lies. It is incumbent on him as an Appellate Court to form an independent judgment on the evidence, and not to give a decree in favour of the Plaintiffs unless he is satisfied that they have established their case."

And the grounds upon which the High Court (*White* and *Macpherson*, JJ.), after the decision upon remand, finally dismissed the suit were as follows:—

"We have nothing to do here with the question whether this remand order was right or wrong, or whether, if this second appeal had, when it first came before this Court, been heard by us, we

(1) Ind. L. R. 2 Calc. 418.

J. C.
1887
ANANGAMANJARI CHOWDHRANI v. TRIPURA SOONDARI CHOWDHRANI.

should have made a remand order in similar terms, or should have thought the case a proper one for a remand. The remand order has been made. We have simply to construe it and to see that due effect is given to it. We think that what the High Court meant in remanding the suit was that it should be retried with reference to the third issue, and that the Plaintiffs should be precluded from relying upon a title acquired by prior adverse possession. The obligation was thus thrown upon the Plaintiffs of proving that the chur was a re-formation on the site of land which, upon the division mentioned, and before the diluviation of the land, formed part of their 13½ annas share. There is no doubt that a great burden of proof was imposed upon the Plaintiffs by the form of the third issue, and it may be that that burden ought never to have been so imposed. But with that, as I have already said, we have nothing to do. I would only remark that if a mistake has been made to the prejudice of the Plaintiffs, the initial mistake was made in the Subordinate Judge's Court when the third issue was framed, for it does not appear to have been warranted by the allegations contained in the plaint.

"We also think it quite clear that whatever be the construction of the remand order, the High Court did then pronounce a final opinion upon the title of long and continuous possession, which was found in favour of the Plaintiffs in the Courts of the Subordinate Judge and of Mr. *Tweedie*, and did then also decide that upon the pleadings in the case, and the issue which had been framed, it was not open to the Plaintiffs to shew or rely upon such a title; and we cannot review that decision. Now, when Mr. *Peterson's* decree is examined, it is apparent that the very title which the High Court has decided against is the very title which Mr. *Peterson* has found to be in the Plaintiffs, and upon which he grounds his decision in their favour. Although Mr. *Peterson* correctly states the nature of the remand order in the commencement of his judgment, when he says that 'the case has been remanded by the Special Appellate Court for the retrial of the main issue in the suit, or in other words, that this Court may form an independent judgment on the evidence as to the third issue framed by the Subordinate Judge;" and although

Mr. *Peterson* in fact concludes his judgment with a formal finding upon this issue, or rather upon a portion of it, in favour of the Respondents, as when he says,—'On the whole, then, I come to the conclusion that the Subordinate Judge's decision is correct, and that the Plaintiffs have proved that the lands claimed by them belong to their 13½ annas share of mouzahs *Bil Nalchoongi* and *Bil Silpatta*," it is evident from the rest of Mr. *Peterson's* judgment that there was not a particle of evidence offered to prove when the chur lands re-formed, nor where they re-formed, much less evidence which shewed that they re-formed upon the site of 13½ annas share which originally belonged to the Respondents. Such remarks as the District Judge has made upon the evidence are limited to the proof which was given by the Plaintiffs of the long and continuous possession which they enjoyed previous to their ouster by the Defendants.

"Such being the case, the decree of the Lower Court cannot be sustained. It is not suggested that there is any evidence on the record shewing when the re-formation took place, or that it was a re-formation on the 13½ annas share, nor does the remand order allow of further evidence being given. After reading the various judgments of the three Courts below, which have had possession of this case for so long a time, and hearing what the pleaders for the parties have to say, it becomes plain that there is no evidence in this case on the above points, and that when the remand order was made which tried the Plaintiffs' case up to the third issue, their suit was virtually decided against them.

"As there is no evidence in the case as to the date or site of the re-formation, and the Court below has no materials upon which it could come to a finding on the third issue, it would be useless to send this case down again to the Lower Court, and we have no alternative but to reverse the decree of the Lower Appellate Court and dismiss the suit of the Plaintiffs, which we do with costs in all Courts."

Doyne, and *C. W. Arathoon*, for the Appellants, referred to *Shiro Kumari Debi* v. *Gobind Shaw Tanti* (1), and contended that the suit could not be dismissed on the ground of no evidence having

(1) Ind. L. R. 2 Calc. 418.

J. C.
1887
ANANGAMANJARI CHOWDHRANI v. THIPURA SOONDARI CHOWDHRANI.

been given. There was evidence of possession, and unless that was satisfactorily rebutted the Plaintiffs' case was established. The High Court in special appeal were limited to the question whether there was no evidence at all in support of a finding.

Cowie, Q.C., and *Branson*, contended that the issue was as to the re-formation of the land in question upon a particular site at a particular date, and that the fact of possession for a greater or less period was not admissible evidence thereunder. Reference was made to *Lopez* v. *Muddun Mohun Thakoor* (1).

Counsel for the Appellants were not called on to reply.

1887
March 11.

The judgment of their Lordships was delivered by

LORD WATSON :—

In this case the parties are the respective owners of two divided shares of mouzahs *Nalchongi* and *Silpatta*. The Plaintiffs are interested in the larger of those shares, extending to 13 annas 10 gundahs. The Defendants are proprietors of the smaller share, extending to 2 annas 10 gundahs. The area of land which is in dispute in this action is situated on the bank and close to the *alveus* of the *Ichamutti* river. It is subject to the action of the stream; and it appears that from time to time the soil on the surface of the area has been washed away, and new soil has been subsequently deposited capable of cultivation. The exact date when the surface was last denuded does not appear; but it seems to be admitted on all hands that for many years past a new deposit has been growing up, and that in point of fact such deposit, since some time after the year 1850, has become culturable. In the end of 1872, or the beginning of 1873, disputes arose between the Appellants and the Respondents as to the right to the disputed ground. The magistrate intervened in February, 1873, and, after inquiry, he adjudged that the Plaintiffs were in possession, and had a right to retain possession of it. The Defendants then instituted a possessory suit, and on the 13th of April, 1873, they obtained a decree affirming their right to possess. That led to the institution of the present action, in which the

(1) 13 Moore's Ind. Ap. Ca. 467.

Plaintiffs, who were ousted under the decree of April, 1873, claimed the property of the disputed area as having been all along in their possession as part of their 13 annas 10 gundahs share of the two mouzahs in question. The Defendants resist the action on the ground that they had been in possession, and that the land in dispute was an integral part of their smaller share of these mouzahs—the 2 annahs 10 gundahs share. Throughout these proceedings, at least since proof was closed, it is admitted on both sides that the area in dispute belongs to one or other of these two demarcated shares.

Issues were adjusted by the Subordinate Judge. It is only necessary to deal with the third of them; because it is conceded now that if the Plaintiffs shall be held to have a right to the land, as part of their 13 annas 10 gundahs share, they are not barred by limitation from prosecuting the present suit. The third issue adjusted was in these terms:—"Is the land in claim a re-formation on the site of the original diluviated land of the 13 annas 10 gundahs share of *Kismat Nalchongi* and *Silpatti*, held by the Plaintiffs and *pro formâ* Defendants, or of the 2 annas 10 gundahs share held by the substantive Defendants?" The Subordinate Judge, after an elaborate review of the evidence before him, came to the conclusion, which is embodied in this finding, "The allegation made by the Plaintiffs that the land in claim is a re-formation on the site of the original land of *Nalchongi* and *Silpatta* covered by their 13 annahs 10 gundahs share, and that they have from before been in possession of it is found true." In other words his finding amounts to an express affirmation of the first alternative branch of the third issue, which exhausts the issue.

Upon appeal by the Defendants to the District Judge, he came to the conclusion that the judgment of the Subordinate Judge ought to be maintained. He concurs to a great extent in the view taken by that Judge of the evidence, but he differs from him in his estimate of that evidence in many respects. The conclusion which he came to upon the part of the case which we are now dealing with was this, that the Plaintiffs "held, occupied, and enjoyed the lands in suit by the title above set forth as part and parcel of the lands appertaining to the 13½ annas demarca-

J. C.
1887
ANANGAMANJARI CHOWDHRANI v. TRIPURA SOONDARI CHOWDHRANI

tion for much more than twelve years before ousted by the Defendants." That was not a simple affirmation of the conclusion at which the Subordinate Judge had arrived. It pointed to a very different kind of case from that to try which issue No. 3 had been adjusted. It affirms a title, at least it is sufficient to affirm a title, by adverse possession, which is a title in derogation of the Defendant's right, even assuming it to be proved that at an earlier period the land in dispute formed part of the smaller share, and not of the 13 annas 10 gundahs share belonging to the Plaintiffs. Accordingly when the case was carried by appeal before the High Court of *Calcutta*, the learned Judges came to the conclusion that the decree of the District Judge ought to be set aside, and the case remanded for re-trial. The High Court were of opinion that the District Judge had not disposed of issue No. 3, that his finding No. 2 was not an answer to that issue, but the affirmance of a title which would prevail over the title which would have arisen to the Defendants by the negation of the first branch of issue No. 3, and the affirmance of the second branch; and they were also of opinion, although their Lordships are not altogether disposed to concur with them in that respect, that the District Judge had not applied his judicial mind to the consideration of the somewhat intricate evidence before him.

On remand the case was heard and disposed of before the successor of the District Judge who had first disposed of the case. He, in the main, agrees with the Subordinate Judge in his estimate of the evidence, and he affirms the judgment of the Subordinate Judge. The conclusion which he came to on the evidence is very concisely expressed in these words:—"On the whole then I come to the conclusion that the Subordinate Judge's decision is correct, and that the Plaintiffs have proved that the lands claimed by them belong to their 13½ annas share of mouzahs *Bil Nalchongi* and *Bil Silpatta*."

Again the Defendants appealed to the High Court, and the cause there was heard and determined before two fresh Judges, who came to the conclusion that the decree of the Lower Appellate Court ought to be reversed, and the suit dismissed, and accordingly they gave effect to that opinion in their judgment.

The grounds upon which the learned Judges of the High

Court came to that conclusion are very distinctly expressed in their judgment. They are two-fold; and, in the opinion of their Lordships, neither of these grounds is sufficient to sustain the judgment which was pronounced. They came, in the first place, to the conclusion that Mr. *Peterson*, who last disposed of the case, had fallen into the same error as his predecessor, and, instead of dealing with the identity of this disputed parcel with one or other of the two shares of the mouzahs in question, had disposed of the case on the footing that the Plaintiffs had enjoyed prescriptive possession which vested them with a good title as against the Defendants. The learned Judges say: "The judgment now before us contains a finding by the Court that, prior to the ouster by the Appellants, the Plaintiffs had a sufficiently long and continuous possession of the chur lands to confer upon them a title to it." Their Lordships are of opinion that the learned Judges erred in supposing that the judgment of Mr. *Peterson* contains any finding to that effect.

Then, having come to the conclusion that Mr. *Peterson* had erred in the same way as his predecessor, and had not dealt with the proper issue in the case, they proceed to consider whether they ought to remand the cause for the purpose of having that 3rd issue tried. They came to the conclusion that it was unnecessary to do so for these reasons: "As there is no evidence in the case as to the date or site of the re-formation, and the Court below has no materials upon which it could come to a finding on the 3rd issue, it would be useless to send this case down again to the lower Court." They came to a conclusion the very reverse of that at which their predecessors, who remanded the case, arrived; they were of opinion that there was evidence in the case bearing upon the subject-matter of the 3rd issue, which ought to be disposed of by the Judge in the Court below. The High Court, on this last occasion, came to the opposite conclusion—that there was no evidence whatever which was fit for the consideration of the Judge, or had any bearing on that issue.

It must be borne in mind that the decree appealed from to the High Court on this occasion being a decree after remand, on a second or special appeal, the learned Judges had not, and accordingly they did not profess to have jurisdiction to deal with it on

J. C.
1887
ANANGAMANJARI CHOWDHRANI v. TRIPURA SOONDARI CHOWDHRANI.

its merits. But it was, in the opinion of their Lordships, within their jurisdiction to dismiss the case, if they were satisfied that there was, as an English lawyer would express it, no evidence to go to the jury, because that would not raise a question of fact such as arises upon the issue itself, but a question of law for the consideration of the Judge.

Their Lordships are very clearly of opinion that the reasons assigned by the learned Judges cannot be sustained. They are of opinion, with the Judges who made the remand, not only that there was an issue proper to be tried, but that there was evidence in support of that issue, or bearing upon that issue, which was proper to be considered and disposed of by the District Judge. The theory upon which the learned Judges who last disposed of the case proceeded, so far as one can gather from their observations, appears to have been this: that evidence of possession is not receivable as evidence of the identity of a piece of ground; that, in other words, evidence of possession is not material or good evidence in a question of parcel or no parcel. Perhaps they do not go quite so far as that, but they certainly go the length of indicating their opinion that evidence of subsequent possession is not good evidence upon the question of parcel or no parcel at a previous date. To countenance that proposition would be to introduce an entirely new rule into the law, and their Lordships do not think that a judgment resting upon such a ground can be upheld. When the state of possession for a long period of years has been satisfactorily proved, in the absence of evidence to the contrary, *presumitur retro*. In the present case there is evidence tending to prove possession by the Plaintiffs for a considerable period antecedent to February, 1873. Whether it is sufficient to establish the Plaintiff's possession, and whether if established that possession is sufficient to warrant the inference of fact derived from it, are questions upon the merits of the case. The evidence has been disposed of by the Judge below as a Court of appeal after careful consideration, and upon the merits his judgment was final in the High Court, which was sitting upon a second appeal, and is final and binding upon this Board.

Their Lordships will accordingly humbly advise Her Majesty that the last judgment of the High Court ought to be reversed,

the judgment of Mr. *Peterson*, the District Judge, affirmed, and the appeal dismissed with costs in the High Court. The Respondents must pay to the Appellants the costs of this appeal.

Solicitors for the Appellants: *T. L. Wilson & Co.*
Solicitors for the Respondents: *Watkins & Lattey.*

J. C.
1887
ANANGAMANJARI CHOWDHRANI v. TRIPURA SOONDARI CHOWDHRANI.

ABDOOL HOOSEIN ZENAIL ABADIN AND ANOTHER . . . . . } DEFENDANTS;

AND

CHARLES AGNEW TURNER (OFFICIAL ASSIGNEE OF THE ESTATE OF AGA MAHOMED SHIRAZEE) . . . . . } PLAINTIFF.

J. C.*
1887
March 3, 4, 30.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Fraud must be proved as laid—Relief cannot be granted on a Charge of Fraud not contained in the Pleadings.

It is a well-known rule that a charge of fraud must be substantially proved as laid, and that when one kind of fraud has been charged another kind of fraud cannot on failure of proof be substituted for it.

Montesquieu v. *Sandys* (18 Ves. 302) approved.

Where the plaint charged a fraudulent concealment of a particular payment from the official assignee, it was unjust and unprecedented for the Court to allow the plaint to be amended after all the evidence had been taken, so as to charge that the payment itself, though known to the official assignee, was a fraud on the Court which he had no power to assent to.

The High Court having granted the relief prayed on a finding that a totally different fraud, not alleged in either the original or amended plaint, had been effected, viz., a fraudulent conspiracy between the parties to the payment and receipt of the money:—

Held, that such judgment must be reversed.

APPEAL from a decree of the High Court (May 9, 1885), reversing a decree of the same Court in its original jurisdiction (Sept. 21, 1883).

The suit was commenced on the 25th of January, 1881; the Plaintiff, as official assignee of the estate of *Aga Mahomed Rahim*

* *Present*:—LORD WATSON, LORD FITZGERALD, LORD HOBHOUSE, and SIR BARNES PEACOCK.

J. C.
1887
ABDOOL HOOSEIN ZENAIL ABADIN v. TURNER.

Shirazee, seeking to recover from the heirs and representatives of *Hajee Zenail Abadin* a sum of Rs.1,50,000 and interest thereon at the rate of 9 per cent. per annum, from the 28th of August, 1875, which sum was alleged to have formed part of the estate of which the Plaintiff was such assignee, and to have been improperly received and retained by *Hajee Zenail Abadin*.

The facts are stated in the judgment of their Lordships. Shortly the case was this. A consent order of Court was made on the 12th of July, 1875, terminating two suits between the family of *Shoostry* and that of *Shirazee*, an insolvent, by a compromise, under which Rs.2,25,000 should be paid out of a fund in Court in settlement of all claims of the family and creditors of *Shirazee*, and the balance of the fund to the *Shoostry* family. Thereafter by an independent agreement, which both Courts found was known to the official assignee, Rs.1,50,000 were paid to *Hajee Zenail Abadin* in settlement of his claims on behalf of himself and the *Shirazee* family; the remaining Rs.75,000 being retained by the official assignee.

The case originally alleged in the plaint was that the payment of the said Rs.1,50,000 was fraudulently concealed by *Hajee Zenail Abadin* from the Court, and from Mr. *Gamble*, the official assignee. At the end of the trial, after the case resting on concealment from Mr. *Gamble* had broken down, and the evidence had been closed, *Scott*, J., allowed an amendment raising the case that, if Mr. *Gamble* knew of the payment, he had no power to consent to it, as his doing so was a fraud on the Court.

Scott, J., found, as the result of the evidence, that *Hajee Zenail Abadin* did not hold any confidential position towards the official assignee, and that his assistance in the suit, which ceased in 1871, was given in his own interest, and in that of the *Shirazee* family, and not in that of the official assignee. He laid stress on the fact, established by the evidence, that after 1871 *Hajee Zenail Abadin* was in the negotiations represented by a separate solicitor, and found that there was no duty upon him to give information to the Court, in the eyes of which he had no *locus standi*. He dismissed the suit with costs.

The Court of Appeal, while agreeing with the finding of *Scott*, J., as to the knowledge of Mr. *Gamble* of the payment to

Hajee Zenail Abadin in 1875, held that the latter stood in a fiduciary relation towards the former, and gave judgment for the Plaintiff on "the larger principle that an insolvent (and such was virtually the case here, *Zenail Abadin* having, on his own admission, acted as agent for the insolvent family, although possibly with the view to his own interests), who has set the official assignee in motion with a view to enforcing a claim against a debtor to the insolvent estate, and has taken an active part in the prosecution and compromise of the suit instituted for the above purpose in the name of the official assignee, cannot derive any benefit from such suit except on the condition of acting in perfect good faith to the creditors. His deriving any benefit from the suit, except on that condition, would in our opinion be a fraud on the creditors, and on the Act itself; and a Court of Equity would properly regard him, as holding any such benefit, as a trustee for an insolvent estate." The Court of Appeal further held that Mr. *Prescot*, the solicitor for *Abdool Latiff*, had, on behalf of *Zenail Abadin*, put "pressure fraudulently brought to bear" on Mr. *Gamble*, of which pressure "the transaction by which *Zenail Abadin* obtained Rs.1,50,000 was the result."

The High Court decreed that the Defendants should pay the Respondent Rs.2,80,894 for debt and interest.

Sir *Horace Davey*, Q.C., and *Rigby*, Q.C. (*Davenport*, and *Jardine*, with them), for the Appellants, contended that the case of fraud as made by the plaint having failed, the suit ought to have been dismissed. *Scott*, J., was wrong in allowing a substituted charge of fraud after the Plaintiff's case was closed. During the trial he had ruled as inadmissible and excluded certain evidence which the Appellants had tendered, and which would have been relevant on the issue as to the substituted charge, for it would have negatived the imputation of fraud or misconduct to *Gamble* in the matter of the compromise. The evidence established the correctness of the finding by *Scott*, J., that there had been no fiduciary relation on the part of *Zenail* either to the official assignee or to the creditors. The concurrent finding that *Gamble* knew of and consented to the transaction complained of was right. Moreover he could not have interfered with it.

J. C.
1887
ABDOOL HOOSEIN ZENAIL ABADIN v. TURNER.

Graham, Q.C., and *W. P. Beale*, for the Respondent, contended that the decree of the High Court was right. In the suit of 1858 *Hajee Zenail Abadin* acted as agent for or held a fiduciary position towards the Plaintiffs and the creditors of the insolvent. He was therefore prohibited from deriving any benefit or advantage from such suit until the claims of such creditors had been discharged in full. He was equally prohibited from doing so whether he sought it for the heirs or family of the insolvent or for himself in respect of his advances (if any), all of which had of course been made subsequent to the insolvency. The sanction of the Insolvent Court had never been applied for or obtained to the compromise; and when the consent decree was obtained the payments now objected to were not mentioned. The Respondent first became aware of the payment of Rs.1,50,000 in July, 1880, and thereupon demanded that it should be handed over to him. His predecessor, Mr. *Gamble*, had no authority without the sanction of the Court to compromise his claims for any sums insufficient to pay the creditors in full.

The counsel for the Appellants were not called upon to reply.

1887
March 30.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

The suit in which the judgment under appeal was pronounced was instituted in the year 1881 in the High Court of *Bombay*, Original Civil Jurisdiction, by the present Respondent as assignee of the estate and effects of *Mahomed Rahim Shirazee*, an insolvent, against the heirs and legal representatives of *Hajee Zenail*, to recover, with interest, a lac and a half of rupees, received by him under a compromise made in 1875.

The facts of the case, prior to the negotiations in 1870, may be shortly stated almost in the words of the judgment of the Appellate Court.

The suit arose out of litigation, dating as far back as 1834, between two Persian families, who, for convenience' sake, may be described as the *Shoostry* and *Shirazee* families. A merchant of the *Shoostry* family, *Mahomed Ally Khan*, who died in *Bombay* about 1820, left a relation as executor of his estate, who again

appointed in his stead *Mahomed Rahim Shirazee*. A suit which had been brought by the *Shoostry* family against the original executor for an account was revived in 1834 against *Mahomed Rahim Shirazee*, and, in 1846, the Master in Equity, by his report, found *Mahomed Rahim Shirazee* liable to the estate for over 11 lacs. This report was confirmed by the Supreme Court, and a decree passed on the 17th of September, 1847, directing *Mahomed Rahim Shirazee* to pay the said amount. On appeal, however, to the Privy Council, in 1847, the accounts were ordered to be retaken. In the meantime the decree had been executed against *Shirazee*, who had in consequence become insolvent and filed his schedule. On leaving *Bombay*, which he was allowed to do after suffering imprisonment, he appointed the before mentioned *Zenail*, a merchant of *Bombay*, as his representative, with a power of attorney, which, after his death in *Persia* in 1856, was renewed by his children.

The power of attorney by the children was dated the 23rd of December, 1857, and authorized *Zenail* to recover, hold, take care of, and guard all the property to which they were entitled, and to appoint any other person as attorney.

In 1858 *Zenail*, in his representative character, urged the then official assignee, *Oswald William Ketterer*, to file a suit against the representatives of the *Shoostry* family to have the accounts retaken in accordance with the direction of the Privy Council, and by a decree made on the 24th of February, 1859, the suit was referred to the Master in Equity for the purpose of taking the accounts.

It may be mentioned that in the schedule filed by *Shirazee*, the insolvent, *Mirza Mahomed Shoostry* and *Bebee Mariam Begum* were inserted as creditors or claimants for Rs.11,74,459 (the amount decreed against him in the suit of 1834), with the following remark: "Disputed. Amount due under a decree of the Supreme Court in a cause in the Equity side, wherein the detaining creditors were Complainants, and the insolvent was Defendant, as executor of the last will and testament of *Aga Mahomed Ally Khan*, deceased, whereby it is ordered that the said insolvent do pay into the hands of the Accountant-General the sum of Rs. 11,74,459. 0. 65 reas, being the balance reported by the

J. C.
1887
ABDOOL HOOSEIN ZENAIL ABADIN v. TURNER.

Master, in manner and at the periods following, that is to say, the sum of Rs.1,00,000, part of such balance, on the 1st day of January now next ensuing the date hereof, and the like sum of Rs.1,00,000 on the first day of each and every succeeding month until the sum of Rs.6,00,000 shall have been so paid by the said insolvent to said Accountant-General, and that the said insolvent do pay the further sum of Rs.1,00,000 to the said Accountant-General on the 1st day of October next ensuing the date hereof, and the like sum on the first day of each and every then succeeding month, until the sum of 11 lacs of rupees should have been so paid into Court, and the said sum of Rs.74,459. 0. 05 reas, being the residue of the said balance, on the 1st day of March, which would be in the year 1848. On the 16th day of October, 1847, a writ of attachment was issued for non-payment of one instalment, and executed upon the insolvent, and since that the other writs have issued, under which the whole of his property has been sequestered and sold, but the insolvent does not know what amount has been realized, and has therefore inserted the whole amount decreed to be paid."

There is no difference of opinion between the two Courts either as to the terms of the negotiations of 1870 or of the actual compromise which was finally arranged in 1875.

Speaking of the negotiations in 1870, the Appellate Court say: "The result of those negotiations was a compromise, by which the Defendants in the suit (*i.e.*, the *Shoostrys*) were to pay, in settlement of all claims whatsoever of the *Shirazee* family, out of the fund in Court, the sum of Rs. 2,25,000. Out of this sum the official assignee was to be paid, and the balance was to go to the family of *Aga Mahomed Rahim* (*i. e., Shirazee*), and all the other property in litigation handed over and conveyed to the *Shoostry* family. Mr. *Keir*, the then solicitor of the *Shoostry* family, subsequently agreed with Mr. *Gamble*, who was then the official assignee of *Shirazee*, that he should receive Rs.65,000 in discharge of his claims, and Rs.10,000 in lieu of his commission. This compromise, however, was not carried out."

It appears from the 9th paragraph of the plaint that, at the time of the compromise, there were in the hands of the Accountant-General of the Court, standing to the credit of the suit of

1834, Government promissory notes and cash of the value of about four lacs of rupees, and in the hands of Mr. *Gamble*, the then assignee, who was also receiver in the suit, a valuable property in *Bombay*, known as the *Mazagon* dockyard, also valued at about four lacs.

To this property there were in 1870, and also at the time of the compromise in 1875, three distinct claims depending on the result of the suit. First, there was *Abdool Latiff*, who represented the original Plaintiff in the suit of 1834, and who had originally obtained a decree for upwards of 11 lacs of rupees. Secondly, there was Mr. *Gamble*, the assignee of *Shirazee*, who had inserted in his schedule as a disputed item (11 lacs odd) decreed against him; and third, there was *Zenail*, who represented the family of *Shirazee* under the power of attorney which he held from them, and against whom he probably had a claim for money advanced by him to carry on the litigation, but which was a matter entirely between him and the family of *Shirazee*, in which the assignee or the creditors had no concern.

"At the close of 1874 (as found by the Court of Appeal) negotiations were revived by Mr. *Prescot*, a member of the firm of *Keir, Prescot & Winter*, who had succeeded to the management of the case of *Abdool Latiff Shoostry* on Mr. *Keir's* departure for *England*. These negotiations led to the original compromise of 1870 being carried into effect in 1875. Rs.75,000 (made up of the Rs.65,000 to meet the claims of creditors, and Rs.10,000 for Mr. *Gamble's* commission) were paid to Mr. *Gamble*, the suit was dismissed, and the balance of Rs.1,50,000 was paid to *Zenail Abadeen* as representing the *Shirazee* family."

In the judgment under appeal the High Court say:—

"The present suit is now brought by the official assignee of the insolvent estate of the late *Aga Mahomed Rahim Shirazee* to recover the above sum of Rs.1,50,000 from the representatives of the late *Zenail Abadeen*, charging that the same forms part of the estate of the insolvent, on the following grounds:—

"1st, that *Zenail* compromised the suit as the agent and confidential adviser of the official assignee; and 2nd, that the payment to *Zenail* was fraudulently concealed by *Zenail* and his sons from

J. C.
1887
ABDOOL HOOSEIN ZENAIL ABADIN v. TURNER.

this Court, and also from Mr. *Gamble* before and after the passing of the consent decree; but that, even if Mr. *Gamble* was aware of the Rs.1,50,000 being paid to *Zenail*, the said payment was a fraud upon this Court and the creditors, which Mr. *Gamble* had no power to consent to, and such consent could not be binding on his successor."

The tenth to the fifteen articles of the plaint as it originally stood were as follow:—

10. In the year 1875 an arrangement was made for the compromise of the said suit, *i.e.*, the suit of 1858, the said *Hajee Zenail Abadeen* and his son the Defendant *Abdool Hoosein* acting in the negotiations which resulted in such compromise as the agents or confidential advisers of the Plaintiff in the said suit.

11. By a consent decree made in the said suit on the 12th of July, 1875, copy whereof is hereto annexed and marked C, it was ordered that, the said Accountant General should, out of the said Government promissory notes and moneys in his hands, pay to the Plaintiff in the said suit the sum of Rs.75,000 and the costs of the said suit, and should make over and pay to the solicitors of the Defendant in the said suit the balance of the said Government promissory notes and moneys, and that the Plaintiff in the said suit, who was also the receiver appointed therein, should assign the said immoveable property to the Defendant therein.

12. In pursuance of the said decree the said sum of Rs.75,000 was paid to the Plaintiff in the said suit.

13. The Plaintiff has lately been informed and believes that before the passing of the said consent decree it had been agreed between the Defendant in the said suit and the said *Hajee Zenail* that the amount for which this suit should be compromised was the sum of Rs. 2,25,000, and not Rs.75,000 only, and that out of the said Government promissory notes and moneys the said sum of Rs.2,25,000 should be paid in full settlement of the claims of the estate of the said *Shirazee* in the said suit, but that Rs.75,000 only out of the said sum of Rs.2,25,000 should be paid to the Plaintiff in the said suit, and the Rs.1,50,000, the balance thereof, should be paid to the said *Hajee Zenail*.

14. After the passing of the said consent decree, namely, on or

about the 28th of August, 1875, Messrs. *Prescott & Winter*, the solicitors for the Defendant in the said suit, paid to the said *Hajee Zenail* the sum of Rs.1,50,000, being the balance of the said sum of Rs.2,25,000 after deducting the said sum of Rs.75,000 paid to the Plaintiff in the said suit, and the said *Hajee Zenail* and his son, the said *Abdool Hoosein*, retained the said sum of Rs.1,50,000, and applied the same for their own purposes. A receipt for the said sum of Rs.1,50,000 was given by the said *Hajee Zenail*, or by the first Defendant on his behalf, to the said solicitors, but the Defendants allege that the said receipt was subsequently returned to the said *Hajee Zenail*, and that he destroyed the same. Hereto annexed and marked D is a document which, as the Plaintiff is informed and believes, is a correct copy of the said receipt.

15. The Plaintiff says that the fact that the said sum of Rs.2,25,000 was agreed to be paid for the compromise of the said suit, and that Rs.1,50,000, part thereof, was to be paid to the said *Hajee Zenail*, was fraudulently concealed by the said *Hajee Zenail* and his sons, the first and second Defendants, from this Honourable Court, and also from the said *Henry Gamble*, before the time of and after the passing of the said consent decree.

The learned Judge in the First Court found that *Zenail* was not the agent of the assignee, and was at no time invested with a fiduciary character, and that he did not conceal from Mr. *Gamble* the fact of the payment to him of the Rs.1,50,000. He said it was clear that Mr. *Gamble* was fully aware of all the terms of the compromise, whether of 1870 or 1875.

The learned Judge had, however, after the case had been closed, allowed the 15th article of the plaint to be amended by adding the words, "And the Plaintiff further saith that, even if the said *Henry Gamble* was aware of the sum of Rs. 1,50,000 being paid to the said *Hajee Zenail*, the said payment was a fraud upon the Court, which the said *Henry Gamble* had no power to consent to, and such consent could not be binding on his successor." The learned Judge, therefore, went on to consider whether *Zenail* fraudulently concealed from the Court the fact of the payment of the Rs.1,50,000. He said, "To sum up, I do not think it proved

J. C.
1887
ABDOOL HOOSEIN ZENAIL ABADIN v. TURNER.

that *Zenail* held any official position towards the official assignee. He assisted in the suit, but that was in his own interest. Nor do I think he was guilty of any improper concealment. It was not his duty to inform the Court. He had no *locus standi* in the eyes of the Court."

Their Lordships concur entirely in that opinion. *Zenail* did not act as the agent of or in a fiduciary relation to the official assignee either at the commencement of the suit of 1858 or in the conduct of it. He, no doubt, gave very valuable assistance, but he was acting, as was well known to the assignee throughout, on behalf of the heirs and representatives of *Shirazee*, and possibly of himself as having made advances for conducting the suit, and not on behalf of the creditors. Certainly there was no fiduciary relation between him and the assignee at the time of the negotiations for the compromise of 1875 or at the time of the application for the consent decree. He was not *Dominus litis*, nor in any way connected with the Court; he owed no duty to the Court, and he was under no obligation to the creditors. Nor is it likely that the Court, even if all the facts had been brought to their notice, would have inquired whether the decree was likely to be beneficial to the creditors when all the parties to the suit consented to have it dismissed. Indeed, the Court would have had no means of forming a judicial opinion upon the subject until the accounts had been retaken, which it was the object of all parties to avoid. The brief to counsel who appeared in Court on behalf of the assignee to consent to the compromise was prepared by the solicitor for the assignee, who was fully acquainted with all the facts of the case.

The learned Judge, however, proceeded, — "He (meaning *Zenail*), may have got, and I think he did get more than his share. He may also have appropriated to himself what was intended for those he represented. In the first case a suit might have been brought within three years of the knowledge of the official assignee, but that knowledge began in 1875, and the suit is now barred by the *Statute of Limitations*, there being no fraud on the part of *Zenail*."

Their Lordships do not understand what is meant by *Zenail's* share. It was a matter of controversy between the parties how

much each should receive, and there is no ground for saying that *Zenail* took any unfair advantage of Mr. *Gamble*. Their Lordships, however, are clearly of opinion, that under the plaint in this suit, the question cannot be entered into whether *Zenail*, by the terms of the compromise, got more than his share or not.

The result of the findings of the First Court was that the Plaintiffs' suit was dismissed with costs. The decree was correct, but their Lordships are of opinion that the suit ought to have been dismissed on the merits, and not upon the ground that it was barred by the *Statute of Limitations*.

With reference to the amendment of the plaint, by introducing a new and distinct charge of fraud after all the evidence had been given and the case closed, their Lordships feel bound to say that the allowance of it was contrary to every principle of justice, it was wholly unprecedented, and, to say the least of it, it did not exhibit a sound exercise of judicial discretion.

The Full Court, on appeal, said it was not disputed that after Mr. *Prescot's* evidence it must be taken as a fact that, whatever might have been the extent of Mr. *Gamble's* knowledge in 1870. he was in 1875 acquainted with the intention that *Zenail* was to receive Rs.1,50,000 from the *Shoostry* family, and that he assented to it. This ought to have been an end of the suit. The Court, however, held that *Zenail* acted in a fiduciary relationship towards Mr. *Gamble*; but that even in that case the transaction could be impeached only upon the ground that Mr. *Gamble's* consent was obtained under circumstances amounting to fraud. They held that, under the circumstances of the case, *Zenail* could not derive any benefit from the suit except on condition of acting in perfect good faith to the creditors. They said his deriving any benefit to himself from the suit except upon that condition would in their opinion be a fraud on the creditors and on the Act itself, and that a Court of Equity would properly regard him as holding any such benefit as a trustee for the insolvent's estate. It is not easy to follow the reasoning of the Court of Appeal, by which they arrived at the conclusion that Mr. *Gamble's* consent to accept the Rs.65,000 in satisfaction of the claim of the creditors was obtained under circumstances amounting to fraud on the part of *Zenail*. They treated the Rs.10,000 paid to Mr. *Prescot* as

J. C.
1887
ABDOOL HOOSEIN ZENAIL ABADIN v. TURNER.

a payment made to him to bring pressure on *Gamble* to accept Rs.65,000, in satisfaction of the claim of the creditors.

The High Court refers to the evidence of Mr. *Prescot*. They say, "Mr. *Prescot*, in answer to the question, 'When did you first know or hear that you were going to get the Rs.10,000?' said he could not say, but added, 'While the matter was going on it was hinted to me that a present would be made to me by *Zenail* if I carried the matter through.'"

Elsewhere Mr. *Prescot* said, "*Zenail* gave me Rs.10,000, I suppose out of gratitude for having got the matter through." Looking to all the circumstances, and to the fact that Mr. *Prescot's* clerk, who could not have had much weight or influence with *Abdool Latiff Shoostry*, or in effecting the arrangement with Mr. *Gamble*, also received the sum of Rs.1000 at the same time, it is difficult to understand how the Appellate Court could possibly have arrived at the conclusion that the Rs.10,000 were promised or paid by *Zenail* to Mr. *Prescot* with the fraudulent intent to induce him to bring pressure upon *Gamble*, which but for that payment he would not have done. There is no suggestion that a similar payment was promised to Mr. *Keir*, in 1870, before he made the arrangement with *Gamble* to the very same effect as that made by *Prescot*, his successor, in 1875.

All the parties beneficially interested in the funds in Court, must have been anxious to compromise their claims and to terminate the litigation as speedily as possible. In the words of the learned Judge of the First Court,—"In sixteen years one twenty-fifth part of the accounts had been investigated. At that rate, every person concerned, and the generation to follow, would have passed away with the suit still hung up in the Master's office. Meanwhile the *Shoostrys* were kept out of their inheritance, the creditors of *Shirazes* were deprived of all chance of a dividend, and the family of *Shirazee* were debarred from such share as might be theirs if any sums were found due to their father more than enough to satisfy his creditors." *Zenail*, after the negotiations of 1870, doubtless stood out for the Rs.1,50,000, which, according to the terms of the arrangement then made, were to be paid in satisfaction of the claims represented by him. The Rs.2,25,000 were not paid to him, nor was it agreed between

Abdool Latiff and *Zenail*, that only Rs.75,000 should be paid to *Gamble*, as alleged in the 13th paragraph of the plaint. The Rs.2,25,000 were to be paid in settlement of all claims whatsoever, as well of the family as of the creditors of *Shirazee*. The amount to be paid to *Gamble*, as assignee on behalf of the creditors, was settled by *Prescot* with *Gamble* himself. It was admitted by the Appellate Court, that *Gamble* consented to accept Rs.65,000 in satisfaction of the claims of the creditors, but they considered that undue pressure was brought to bear upon him, in addition to the Rs.10,000, received by him on his own account. *Prescot* in arranging with *Gamble* acted as solicitor for the *Shoostry* family, as *Keir* had done in 1870, and not for *Zenail*. If *Gamble* had insisted upon receiving a larger sum than Rs.75,000, the amount fixed in 1870, there was no more reason that it should come out of *Zenail's* Rs.1,50,000, than out of the surplus which was to go to the *Shoostry* family. There was, therefore, no reason why *Zenail* should bribe *Prescot* to bring pressure on *Gamble*, even if *Prescot* was open to be bribed. It is impossible to understand how it could be held that, in the negotiation with *Gamble* under which he consented to accept Rs.65,000 in satisfaction of the claims of the creditors, *Zenail* was acting in a fiduciary relation to the creditors.

The Court of Appeal having dealt with the Rs.10,000 paid to *Prescot*, proceeded to consider whether Mr. *Gamble* acted in perfect good faith towards the creditors, and upon that point they came to the conclusion that having regard, amongst other things, to his receipt of the Rs.10,000 in lieu of commission, and that that amount exceeded 5 per cent. on the assets recovered, the gravest suspicion was raised that his conduct was not actuated by perfect good faith. In short, the Court of Appeal seem to have considered that Mr. *Prescot* received Rs.10,000 to bring pressure on *Gamble* to consent, and that *Gamble* received Rs.10,000 as an inducement to betray the creditors. The Court of Appeal took no notice of the fact that the intended receipt by Mr. *Gamble* of the Rs.10,000 in lieu of commission was fully explained by Mr. *Gamble's* solicitor, with the reasons for the payment in the brief to counsel to consent to the decree, and that in the decree itself it was expressly declared that it should be lawful for Mr *Gamble*

J. C.
1887
ABDOOL HOOSEIN ZENAIL ABADIN v. TURNER.

to retain in his own hands, and for his own use and benefit, the said sum of Rs.10,000, the same being in respect of future commission as official assignee and receiver in the suit. Further, the decree of the Appellate Court for the payment, by *Zenail's* representatives to the Plaintiff in the suit, of the Rs.1,50,000 with interest, was founded upon the fact that that amount ought to have been paid to *Gamble* in addition to the Rs.75,000, in order that the whole Rs.225,000 might be administered by him. In that case the Rs.10,000 would have been less than 5 per cent. on the Rs.225,000 recovered. The result of the findings of the High Court as to the payments made to *Prescot* and *Gamble* was that, notwithstanding their finding that the fraud alleged in the plaint was not substantiated, they reversed the decree of the First Court, and, upon the principle that in equity *Zenail* could derive no benefit from the transaction, ordered that the present Appellants, the Respondents in the Appellate Court, as the heirs and legal representatives of *Zenail*, should pay to the present Respondent and then Appellant, not merely such a sum as would be sufficient to pay the creditors the full amount of their debts with interest, but the whole sum of Rs.1,50,000, with interest at 9 per cent., amounting to a sum exceeding two lacs and Rs.80,894 for debt, and simple interest thereon at the rate of 6 per cent. per annum from the date of the decree until payment. Their Lordships do not concur in the finding of the High Court as to the object and effect of the payments made to Mr. *Prescot* and to Mr. *Gamble* the assignee respectively. They think it right, however, to point out that the Court of Appeal, whatever might have been their opinion as regards those payments, ought to have confined themselves to the charge of fraud made in the plaint, and that they committed a serious error in deciding the case upon a charge which was not made by the Plaintiff in his original plaint, nor in the plaint as erroneously amended at the close of the case, and which does not appear to have been made at the trial. The charge in the plaint was a fraud in concealing from the assignee the fact that by a compromise of the suit made by *Abdool Latiff* and *Zenail* Rs.2,25,000 were to be paid, and that out of that sum *Zenail* was to receive Rs.1,50,000, and the assignee only Rs.75,000. The fraud charged in the amended plaint was, that the payment

of the Rs.1,50,000 to *Zenail* was a fraud upon the Court which *Gamble* had no power to consent to. The ground upon which the Appellate Court decided the case, though not expressed in very clear terms, was that the payment by *Zenail* to *Prescot* of Rs.10,000 was made as an inducement to him to put pressure upon *Gamble* to induce him to consent to receive Rs.65,000 on account of the claim of the creditors, and that *Prescot* used pressure in order to secure the acceptance of that amount by him. They also substantially treated the payment to and receipt by *Gamble* of the sum of Rs.10,000 in lieu of commission, as an inducement to him to consent to receive the sum of Rs.65,000 in satisfaction of the claims of the creditors, the Court of Appeal expressing their opinion that *Gamble* was not actuated by perfect good faith towards the creditors, and this, notwithstanding the evidence of *Gamble's* solicitor as to what actually took place was objected to and disallowed as privileged. In short, though the fraud charged in the plaint was a fraudulent concealment from *Gamble* by an agent and fiduciary, the ground upon which the judgment of the Court of Appeal was founded was substantially a fraud brought about by *Zenail*, *Prescot* and *Gamble* by bribery, corruption, and being corrupted respectively, and conspiracy to defraud the creditors of *Shirazee*. Neither of those charges appears to have been ever made in the Court of first instance so as to have the judgment of that Court called to or expressed upon them; nor do they appear to have been particularized in the grounds of appeal to the High Court. In short, they seem to have occurred for the first time to the High Court, and not to the Plaintiff in the suit, or to his advisers. It is a well known rule that a charge of fraud must be substantially proved as laid, and that when one kind of fraud is charged another kind of fraud cannot, upon failure of proof, be substituted for it. See the case of *Montesquieu* v. *Sandys* (1), in which it was held (2) that relief cannot be given upon circumstances which are not made a ground of relief upon the record.

Their Lordships might have reversed the judgment of the Court of Appeal on this ground alone, but they have thought it right to say that they do not concur in the opinion expressed by

(1) 18 Ves. 302. (2) Page 314.

J. C.
1887
ABDOOL HOOSEIN ZENAIL ABADIN v. TURNER.

the High Court as to the payments to *Prescot* and *Gamble* respectively.

It was contended before their Lordships that the assignee had no power to consent to the compromise without the authority of the Insolvent Court. That might possibly be a ground for setting aside altogether the arrangement by which *Gamble* consented to receive the Rs.65,000 in satisfaction of the claims of the creditors, as to which their Lordships express no opinion, but it cannot form a ground for altering the terms of the compromise, and allowing the assignee to recover from one who held no fiduciary relationship to him a sum which it was never intended he should receive.

For the above reasons their Lordships will humbly advise Her Majesty to allow this appeal and to reverse the decree of the High Court of Appeal with the costs in that Court, and to affirm the decree of the First Court. The Respondent must pay the costs of this appeal.

Solicitors for Appellants: *Hacon & Turner.*
Solicitors for Respondent: *Watkins & Lattey.*

UMAN PARSHAD . . . . . PLAINTIFF;

AND

GANDHARP SINGH . . . . . DEFENDANT.

J. C.*
1887
July 2, 5, 6.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Alleged Benami Transfer—Evidence—Wajib-ul-arz.

Case in which it was held that an alleged benami transfer operated as a valid conveyance; in the absence of sufficient evidence to the contrary.

A wajib-ul-arz ought not to be entered on the record as a mere expression of the views of the proprietor of an estate; it should be entered as an official record of local customs.

APPEAL from a decree of the Judicial Commissioner (Nov. 10, 1884), reversing a decree of the District Judge of *Sitapur* (April 17, 1883) and dismissing the Appellant's suit with costs.

That suit was instituted on the 7th of September, 1882, to obtain possession of four villages in the zillah of *Sitapur*, viz., *Turni*, *Bukowhan*, *Shahpur*, and *Chandauli*, which the Appellant claimed under two sale deeds, dated the 29th of May, 1863, and the 9th of February, 1864, from *Gulab Kunwar*, who was admittedly full proprietress thereof with absolute power of alienation. *Turni* was the subject of the earlier deed, the remaining villages were the subject of the later deed. Those sale deeds were executed in favour of one *Bissesur Baksh*, the son-in-law of *Gulab Kunwar*.

The Appellant contended that these sale deeds were genuine, and that their intention and effect were to pass the title to *Bissesur Baksh*; that *Bissesur Baksh* died childless on the 7th of November, 1865; that he was succeeded by his widows, the survivor of whom died in October, 1879; and that thereupon the Appellant, as the next reversionary heir of *Bissesur Baksh*, was entitled to succeed.

The Respondent contended that the sale deeds were mere benami transactions, never acted upon and not intended to pass

* *Present:*—LORD HOBHOUSE, SIR BARNES PEACOCK, SIR RICHARD BAGGALLAY, and SIR RICHARD COUCH.

J. C.
1887
UMAN PARSHAD v. GANDHARP SINGH.

the title which remained in *Gulab Kunwar* till her death on the 7th of December, 1866; that on her death her daughter *Fatteh Kunwar* succeeded; that on the 4th of March, 1876, by a deed of gift she conveyed these four villages to her daughter *Musummat Munnia*, who died in her lifetime childless, in March, 1879; and that thereupon the Respondent succeeded thereto by right of inheritance as her husband, with the consent of *Fatteh Kunwar*, and had ever since been in possession thereof.

The main questions in the appeal were whether these sale deeds were benami or operative to pass title, and whether there had been continuous adverse possession of the four villages by *Gulab Kunwar* and her representatives from the dates of the deeds.

The facts are stated in the judgment of their Lordships.

Doyne, and *Mayne*, for the Appellant.

Graham, Q.C., and *Cowell*, for the Respondent.

The authorities referred to were Regulation VII. of 1822, sect. 9; Act XVII. of 1876, sects. 14 and 17; *Rani Lekraj Kuar* v. *Baboo Mahpal Singh* (1); *Sreemanchunder Dey* v. *Gopaul Chunder Chuckerbutty* (2); *Faez Buksh Chowdhry* v. *Fukeeroodeen Mahomed Ahassun Chowdhry* (3); *Kedarnath Mahatah* v. *Kadumbinee Debea* (4).

1887
July 6.

The judgment of their Lordship was delivered by

LORD HOBHOUSE:—

In this case only one question was argued, and that was whether the two transfers executed by *Gulab* in the years 1863 and 1864 to *Bissesur*, the husband of her only daughter, were real transfers, or benami. That question turned out to be a complicated one, and it was necessary to go into a good deal of evidence of a varied and rather voluminous nature. The Plaintiff maintains that the substance of the transaction is the same as the form of it, and that the property, consisting of four villages,

(1) Law Rep. 7 Ind. Ap. 63.
(2) 11 Moore's Ind. Ap. Ca. 28.
(3) 14 Moore's Ind. Ap. Ca. 234.
(4) 10 Suth. W. R. 239.

conveyed to him by deeds duly attested, registered immediately afterwards and subsequently proved and filed in a suit, was actually sold to him. As to the deeds there was no doubt. The only question is whether *Bissesur* the grantee was a benamidar.

It is familiar to us all that the system of putting property benami is so extremely common in *India* that the mere fact of a deed being executed in proper form, and apparently effecting a valid transfer to another, is not as good evidence of a real transfer as it would be in other countries, and even a slight quantity of evidence to shew that it was a sham transaction will suffice for the purpose. Still, such a transfer cannot be considered as nothing. The person who impugns its apparent character must show something or other to establish that it is a benami or sham transaction.

The first question here is, what are the probabilities of the case on consideration of the deeds themselves, and the position of the grantor? What motive had *Gulab* for putting the property into benami? She was not purchasing the property. It was vested in her in possession, and had been so for a considerable number of years. It is not suggested that she was in any difficulties, so that creditors might be baffled by the proceeding. On the contrary it appears that she was a woman of substance and position in her own country. The only suggestion is, that inasmuch as there was a suit between her and her brothers-in-law, represented by one *Balbhadar*, concerning these villages, she used this transaction in order to impede *Balbhadar's* proceedings. But whatever such a transfer might do to impede general creditors, it is difficult to see how it could impede *Balbhadar*, who was claiming the property by a title as directly available against a transferee from *Gulab* as against *Gulab* herself. Moreover the four villages were part of fifteen villages which were the subject of dispute between her and her brothers-in-law, and which she had received on a partition between them. With regard to some of the fifteen villages she was out of possession. With regard to these four she was in possession. She was in possession of more, it requires a minute examination to tell how many, but certainly of five, and no reason can be assigned why she should have selected four villages out of those which were in dispute, and which were

J. C.
1887
UMAN PARSHAD v. GANDHARP SINGH.

in her possession, and have placed those four in the name of a benamidar. There is no antecedent probability that this is a benami transaction.

Then their Lordships ask what is the direct evidence on the point, oral evidence given by witnesses who profess to speak to it. There are two witnesses called for the Defendant—*Hira Singh*, and *Sitaram*—who say that the transaction was a sham one, and that *Gulab* remained in possession, apparently they mean to say during the rest of her life. But they give no details; they speak to no acts of possession, even as to the time of possession their language is quite vague and general; and they tell, both of them, the most extraordinary story with respect to these deeds, namely, that when *Balbhadar*, the person against whom it was suggested that these deeds were to be a defence, appeared upon the scene, *Gulab* immediately told *Balbhadar* that the deeds were all sham deeds. Their Lordships have no hesitation in treating the evidence of those witnesses as worthless.

The only other witness who gives direct evidence on the subject is in rather a curious position. He was the patwari of one or more of these villages—certainly of the village of *Turni*—and he was called in this suit. His name is *Sheo Sahai*. In this suit he stated first that the transaction was a sham one, and that *Gulab* remained in possession, and received the rents. But then a document was put into his hands, which was a deposition made by him in a mutation proceeding sixteen years before and within three or four years of the date of the transactions, and he was asked whether it was true, and he said it was true. He was rather indignant at the truth of it being impugned, and he said:—"Do you think I would tell a falsehood? Of course it is true." But that deposition shews that there was a sale by *Gulab* to *Bissesur*, and that *Bissesur* entered into possession and received the rents, and that when *Fatteh*, who was the common heir of the two, *Gulab* and *Bissesur*, applied for a mutation of names, she applied for it on the footing of *Sheo Sahai's* evidence, and as the heir of *Bissesur*. Therefore the evidence of *Sheo Sahai* must be taken as some evidence to shew possession on behalf of *Bissesur*. There is actually no evidence the other way, and so the balance of testimony on that point inclines in favour of the Plaintiff.

Their Lordships will now turn to another branch of the case. It is said that there is no mutation of names; that no witnesses have been called to prove the deeds; that no proof has been given of payment of the money; no proof of the receipt of the rents: and no proof of the payment of the revenue by *Bissesur*. It is quite true that all that negation of evidence appears in the case. With regard to the mutation of names, the matter is explained in this way. It is said that owing to the dispute between *Gulab* and her brothers-in-law the application for mutation was delayed; and their Lordships certainly find it to be the case that when a decree had been given in favour of *Gulab* in August, 1866, and when such a time had elapsed as, in the opinion of the patwari *Sheo Sahai*, had precluded an appeal, the application is made, namely towards the end of 1866 or the beginning of 1867. That may be the true explanation. But however that may be, the absence of any mutation of names hardly tells much in favour of the Defendant's view, because if this were a benami transaction entered into for the purpose of baffling somebody who was claiming the property, the mutation of names would be an important part of the proceeding; because without that mutation *Gulab* remained the ostensible owner in the Collector's records, and the process of baffling her adversary would be a very imperfect one. Indeed it is common experience that in these benami transactions there is a mutation of names when it is intended to baffle creditors, and all the proceedings which would attend a real transfer are carefully gone through in order to throw a veil over the reality.

With regard to all the other points, it must be remembered that this is not the ordinary case of a benami dispute. In the ordinary case you have the benamidar or those claiming under him on the one side, maintaining that the transaction is a real one; and you have the former owner and those claiming under him on the other side, maintaining that it is a sham; and each party has in his own power such receipts, such evidence of payments, such connection with the agents concerned, as should suffice to prove his own case if it is a true one. But the peculiarity of this case is that the title of benamidar, and the title of the original true owner, coalesced in the person of *Fatteh Kunwar*

J. C
1887
UMAN PARSHAD v GANDHARP SINGH.

within four years of the first transaction and within three years of the second; and it was she—and it is the Defendant who is her representative—who have had in their hands the whole of the evidence necessary to prove whether the transaction was a sham or a real one. Therefore, the absence of evidence certainly does not tell against the Plaintiff, but it rather tells against the Defendant, who might have produced both witnesses and documents which would throw light upon the case.

Under these circumstances great importance is to be attached to assertions of title made, either by *Gulab* or *Fatteh*, from time to time in legal proceedings. Let us follow them in chronological order. In the first place there was *Balbhadar's* suit, which was commenced in 1863, and in which a decree was made in 1866. The Judicial Commissioner has rested great weight upon the decree in that suit as against the Plaintiff. What he says is: "Seeing, then, that *Gulab Kunwar* continued in possession long after the sale deeds, and sued on her own title in her own name, and got a decree for this property in her own name for herself and her heirs, I can hardly imagine a clearer case of adverse possession as against *Bissesur Bakhsh* and his heirs." As to the possession, that has been dealt with; as to the suit, there is clearly an inaccurate statement by the Judicial Commissioner. The suit was instituted by *Gulab* for recovery of several villages which came to her under the partition, and of which, by a series of complicated proceedings, she had lost possession. She never sued for the five villages of which she was clearly in possession, and of which the four now in suit are part. The way in which those villages came in was on the plea of the Defendant, who said that, so far from *Gulab* having the right to recover from him the villages for which she sued, he had the right to recover from her five villages of which she was in possession. How exactly that matter was dealt with in Court before the Judge we do not know. It may have been that the parties agreed there should be a decree covering the whole matter in dispute, but those five villages were not regularly in suit at all. The decree does deal with them. It gives to *Gulab* the absolute proprietary right in them, and dismisses the Defendant's claim—the counter-claim to recover from the Plaintiff the five villages in her possession.

Those words are relied upon as proving *Gulab's* possession. But it is obvious, independently of the fact that it was quite irregular to make a decree about these villages, that there was no question of possession as between *Gulab* and *Bissesur* in this suit. Such an issue never was raised or thought of. The only question of possession, if any, was as between *Gulab* and *Balbhadar*. Strictly and regularly there was no question whatever of possession, but if any were brought in, then it was only as between *Gulab* and *Balbhadar*, and as between those two she was in possession. She was then recorded in the Collector's books, and it was quite sufficient for the determination of any question that could possibly be brought, even irregularly and by consent of the parties to that suit, to treat her as the party in possession. And, in point of fact, the decree uses the right language upon that point. It decrees to her a right against the Defendant *Balbhadar Singh*, and against nobody else.

Then come the mutation proceedings on the 1st of January, 1867, in which the evidence of *Sheo Sahai*, which has been before observed upon, was given. In those proceedings *Fatteh Kunwar*, who was the heir both of *Gulab* and of *Bissesur*, claims to be registered as the heir of *Bissesur*. Why should she have made that claim? Her interest was all the other way. If she were heir of *Gulab* she had absolute dominion over the property. If she were heir of *Bissesur*, she had only the widow's estate, and we shall see presently what importance she attached to that distinction. Moreover, it was more simple to claim as the heir of *Gulab*. She was the recorded owner, and, as far as the Collector's records went, *Fatteh* had only to shew that she was *Gulab's* only child, and the mutation would be made as a matter of course. But she does not do that. She introduces that which is entirely new matter into the Collector's records—the conveyance to *Bissesur*, and then makes out her claim as heir of *Bissesur*. That seems to their Lordships strong evidence that, in the opinion of *Fatteh Kunwar*, or of her advisers at that time, her true title was as heir of *Bissesur*.

Next comes *Ratan Singh's* suit in 1868. *Ratan Singh* after the death of *Gulab* revived the old dispute between *Gulab* and her brothers-in-law, with only this difference: that whereas in

J. C.
1887
UMAN PARSHAD v. GANDHARP SINGH.

Gulab's lifetime they contended that she was entitled only to maintenance, now after her death they contended that she was only entitled to the widow's estate. That dispute was raised in 1868. *Fatteh Kunwar* appears and puts in a plea by her agent, in which she again sets up her title through *Bissesur*. The judgment proceeds on that footing. The judgment is to the effect that the Plaintiff's claim is declared "not to lie against Defendant, who holds as her husband's heir the property acquired by him by purchase from *Gulab*, who was possessed of the legal power to settle." Of course, that is no decision binding the present parties, but it shews, as distinctly as anything can shew, the position which *Fatteh Kunwar* thought it right to assume in the year 1868.

All these things are rather emphasised by the wajib-ul-arz which was made at *Fatteh Kunwar's* instance in 1869. Before dealing with the effect of it, their Lordships wish to make some observations upon the extraordinary and startling character of that document. A wajib-ul-arz has been considered to be an official record, of more or less weight according to circumstances, but still an official record, of the local customs of the district in which it is recorded. It has been received before this tribunal and elsewhere as important evidence. In the case cited from the 7th Indian Appeals it is stated that "these documents are entered on record in the office. They must be taken upon the evidence, which is general evidence, to have been regularly entered, and kept there as authentic wajib-ul-arz papers." In that case effect was given to the wajib-ul-arz produced. In this case the Judicial Commissioner has treated the wajib-ul-arz in question as a document of weight, which must be taken as shewing local customs until some proof to the contrary is produced. But on looking at the evidence their Lordships find that this wajib-ul-arz was the concoction of *Fatteh Kunwar* herself, received by the settlement officer as an expression of her views which she had a right to enter upon the village records, because she was proprietor of the estate. But they are not entered as her views, they are entered as the official record of a custom. And supposing fifty years had gone by, and then a dispute arose about the family or the local custom, this would probably have been produced from the office

as an entry made fifty years ago, under circumstances of no suspicion at all, and it would be taken that the Government officer had recorded it as the local custom. And now we find it deliberately stated (though there was an appeal from the entry of this wajib-ul-arz) by the *Oudh* Courts that the proprietor has the right to enter his own views upon the village records, and have them recorded as if they were the official records of the local customs. Well, that is an exceedingly startling thing, and their Lordships think that the attention of the Local Government should be called to what has appeared in this case to have been done in one instance, and may be done in other instances. It does not only render those records useless—they are worse than useless—they are absolutely misleading, because they are evidence concocted by one party in his own interest. It is to be hoped that under the Act of 1876, which empowers the Local Government to make rules under which these records shall be framed, such proceedings will not take place any more.

So much for the character of the document. Now for its effect. It is not now contended that, if *Bissesur* was entitled, the custom which the wajib-ul-arz asserts can prevail. In fact there is no evidence of it. Mr. *Graham* most properly abandoned that part of the case. But that does not get rid of the circumstance that in 1869 *Fattah Kunwar* thought it to her interest to put this fictitious document on the village records, asserting her own power to alienate such estate as she had got from *Bissesur*. If she had taken everything as the heir of *Gulab*, there was no object in getting the entry made: but if she was the heir of *Bissesur*, then she had a strong object, because otherwise she could not make a complete alienation of the estate.

That, in their Lordships' opinion, strengthens the circumstance that up to that time she had always been asserting herself to be the heir of *Bissesur*, and leads them to conclude that she could not have asserted it for any other reason than because it was the truth.

Then comes the gift by *Fatteh Kunwar* to her daughter in 1876; and again we find that though it is not very precise as to the nature of her title, she states that *Munnia* is a natural heir "after me and my husband." Now that exactly accords with the position which *Munnia* would have if the property came from

J. C.
1887
UMAN PARSHAD v. MANDHARP SINGH

Bissesur, and it does not accord with the position which *Munnia* would have if the property came from *Gulab*. Therefore it appears again that *Fatteh Kunwar* considered herself as taking the property from *Bissesur*, and as conveying it to *Munnia* under that right which she alleged on the face of the wajib-ul-arz that she possessed, but which in fact she did not possess.

The only remaining proceeding is the declaratory suit by *Uman Parshad* in 1876. That raised the very question which has now to be decided in this suit. The suit was got rid of because it was declaratory only. But the parties had now come face to face. *Uman Parshad*, the very man, or representing the very family, against whom the benami transfer was said to be effected, comes and claims the property. Now clearly is the time when this benami title should be set up to embarrass the enemy. But it is not set up. Nothing is said about it, except what may be gathered from a very obscure, and probably very imperfect sentence taken down by the Judge as either the plea or the argument of Mr. *Jackson*, who was the counsel for *Fatteh Kunwar*. It is difficult to gather anything precise from it; but he seems to have suggested that *Bissesur* took as benamidar, not for *Gulab*, but for his wife *Fatteh Kunwar*—a totally different case from that which is made on the present occasion. That again is very strong evidence that *Fatteh Kunwar*, or her advisers, felt that they could not with truth and honesty declare that it was a sham transaction.

Thus we find that *Fatteh Kunwar* had gone on from 1866 to 1879 asserting herself to be in possession of this property as heir of *Bissesur*; and no assertion to the contrary was made during her lifetime. If she had made the contrary assertion, perhaps some proceedings might have been taken; but the lapse of time affords an additional reason why her grantee or representative should not be allowed to turn round and assert a directly contrary title.

The result is that all these lines of consideration point in favour of the Plaintiff's contention; and inasmuch as he has the form of the transaction on his side, and everything points in favour of the substance of the transaction being with him too, his case should prevail.

Their Lordships will humbly advise Her Majesty to discharge the order of the Judicial Commissioner, and to dismiss the appeal to him with costs, and the Respondent must pay the costs of this appeal.

Solicitors for Appellant: *T. L. Wilson & Co.*
Solicitors for Respondent: *Payne & Lattey.*

J. C.*
1887
July 13.

GIRISHCHUNDER MAITI . . . . . DEFENDANT;

AND

RANI ANUNDMOYI DEBI AND BHUPENDRA NARAIN ROY . . . . . } PLAINTIFFS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Limitation—Act XV. of 1877, *Art.* 132—*Construction of Will—Charge on specific immoveable Property.*

Where a will recited that the father of the Appellant had lent the testator Rs.15,000, and devised certain specific immoveable property to the Appellant with directions to repay the debt therefrom with interest:—

Held, that this was a charge thereon, and that a suit by the auction purchaser of the creditor's claim to recover the money was governed by art. 132 of Act XV. of 1877, and having been brought within twelve years was not barred.

APPEAL from a decree of the High Court (Aug. 10, 1881) reversing a decree of the Subordinate Judge of *Midnapore* (March 5, 1880), who had dismissed with costs the suit brought by the first named Respondent to recover the balance of a sum of Rs.24,000 from certain properties of the Appellant or from himself personally. The High Court remanded the case to first Court for trial.

The suit was brought on the 5th of May, 1879, against *Goluckchunder*, guardian, manager and father of the Appellant. The plaint set out the circumstances under which *Girishchunder* had become entitled to the properties of *Shib Pershad Giri* under his will, of which the operative clause in this respect is recited

* *Present:*—LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

J. C.
1887
GHISH CHUNDER MAITI v. RANI ANUNDMOYI DEBI.

in their Lordships' judgment; and also those under which *Goluckchunder* had become a creditor first of *Shib Pershad* and afterwards of the Appellant and an incumbrancer on the properties in suit for Rs.15,000 and interest. It then stated that *Jogendro Narain Roy*, the husband of the first Respondent and adoptive father of the second, was an execution creditor of *Goluckchunder*, and had at auction sale on the 20th of November, 1875, purchased the residue of *Goluckchunder's* claim against the Appellant, and claimed payment thereof out of the properties of the Appellant. The cause of action was alleged to have arisen on the 17th of November, 1874, the date on which the Appellant obtained possession of the properties in suit.

The Subordinate Judge was of opinion that the money sued for was not charged upon the immoveable property devised by *Shibpershad Giri*, and that sect. 10 of Act XV. of 1877 was not applicable to the suit, which fell within the ordinary period of three years.

The High Court (*Cunningham, Prinsep*, and *Wilson*, J.J.) reversed this decree. The material portion of their judgment is as follows:—

"It has been decided in *England* that a charge of debts generally in a will upon the testator's personal estate, or any portion of it, creates no trust so as to exclude the *Statute of Limitations*: *Scott* v. *Jones* (1). The reason is, 'because it does not at all vary the legal liabilities of the parties, or make any difference with respect to the effect and operation of the statute itself. The executors take the estate subject to the claim of the creditors; they are, in point of law, the trustees for the creditors; the trust is a legal trust, and there is nothing whatever added to their legal liabilities from the mere circumstance of the testator himself declaring in express terms that the estate shall be subject to the payment of his debts.'

"In this country there is no distinction between one kind of property and another in respect of its liability for debts. Probably, therefore, upon the principle just referred to (which is not based upon any peculiarity in the English law of trusts), a charge

(1) 4 C. & F. 382.

of debts generally by a testator on his property, or any part of it, would not affect limitation.

"But the case is, I think, materially different when particular property is given upon trust to pay a particular debt or particular debts. In such a case the trustee has a new duty, not the ordinary duty of an executor to pay debts generally out of property generally, but a duty to apply particular property to secure a particular debt. And such trusts of personalty have been upheld in English Courts.

"In *Williamson* v. *Naylor* (1), a testator gave one-fifth of his residuary personal estate upon trust to pay certain specified debts, all of which were barred by limitation at the date of the testator's death. The case came first before Lord *Lyndhurst*, C.B., and afterwards before *Alderson*, B., and it was held, that the effect of the will was to revive the barred debts (the effect of the English statute having been to bar the remedy, not to extinguish the rights); that the trust was a valid trust, and that the creditors claiming under it were entitled as creditors, not as legatees.

"This case, it is true, was decided before *Scott* v. *Jones* (2). But the decision was approved and followed in an exactly similar case by *Shadwell*, V.C., five years after *Scott* v. *Jones* (2) had been decided: *Philips* v. *Philips* (3).

"I think the same rule is applicable in this country, and that a gift of property by will upon trust to pay a particular debt or particular debts, creates a good trust.

"In the present case, the testator gives the property in question to the Defendant, and expressly directs him to discharge certain duties, one of which is to pay the debt of *Goluckchunder* out of the property. It is true that he confides the active administration in the first instance (probably during the Defendant's minority) to the Defendant's father; but that does not relieve the Defendant from discharging the duties imposed, so far as they are undischarged; and then he says expressly, 'I have given to you the whole of the above-mentioned properties under the condition stated in this will.'

"This seems to me clearly a gift only on condition of dis-

(1) 3 Y. & C. (Ex.) 208. (2) 4 C. & F. 382.
(3) 3 Hare, 281.

J. C.
1887
GIRISH-CHUNDER MAITI v. RANI ANUNDMOYI DEBI.

charging the trust; and I therefore think there is a trust within the meaning of sect. 10 of the *Limitation Act*; and that this suit is not barred."

Doyne, for the Appellant, contended that sect. 10 was inapplicable. The plaint did not allege that the properties in suit were charged with the payment of the sum sought to be recovered, nor that they vested in the Appellant upon trust for the specific purpose of paying the same. The will according to its true construction did not vary the legal liabilities of the father so as to charge the loan thereinmentioned upon the property therein devised. Nor did it vest the Appellant with any particular property in trust to pay a particular debt. The judgment of the Subordinate Judge was right, and the suit was barred within three years from the date on which the cause of action arose.

Mayne, for the Respondents, was not called upon.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The only question which has been decided in this suit is whether it is barred by the law of limitation. The Subordinate Judge before whom the case came in the first instance was of opinion that the claim was a claim for money lent, and by art. 57 of Act XV. of 1877 a term of three years only was given for bringing the suit, and that time had expired before the suit was brought.

When the case came before the High Court the learned Judges there were of opinion that sect. 10 of that Act applied on the ground that there was a valid trust for the payment of the money which was claimed in the suit. That section says:—"Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, shall be barred by any length of time." It does not clearly appear whether the learned Judges intended to deal with the other question, that it

was a charge, and so came within the 132nd article of the second schedule of the Act, in which case a period of twelve years is given for bringing the suit. They appear to have rested their judgment upon its being a trust for the payment of the money.

Their Lordships consider that the case may be disposed of upon the question whether the money is charged upon immoveable property; and in order to see whether that is so or not, they have to look at the terms of the will. The will was made by *Shib Pershad*, and purports to be addressed to the present Appellant, who was the Defendant in the suit. It states that the father of the Appellant, *Goluckchunder*, had supplied the maker of it, *Shib Pershad*, with money to sue for the recovery of property of which he had been dispossessed by his cousin, *Jai Narain Giri*, and that a suit had been carried on in the different Courts which had been successful, and that a decree had been obtained for the recovery of the property; and after stating that fact, and also that *Goluckchunder* had shewn great kindness to *Shib Pershad*, it contains these words:—"Therefore you being my nephew (sister's son), and competent to give the pind (funeral cake) to my ancestors, I give you under this will the whole of my moveable and immoveable properties specified in the decrees I have obtained in the original suit, No. 17 of the District Court, and the appeals Nos. 167 and 168 of the High Court, under these conditions, *viz.*, that you will perform, and caused to be performed antim-kriya (cremation) and rites and ceremonies in the proper manner at a reasonable cost, and that you will cause the said kriya to be performed. The loan of Rs.15,000 which I took from your father, the aforesaid *Maitai*, and by means of which I carried on the cases aforesaid from the Zillah Court up to the Sudder Court, in which I have been successful, you will repay with interest from the properties specified in the decrees, and so set me free from liability for that debt." Now if by that will a charge was created upon the property which had been recovered, and which was specified in the decrees, the case clearly came within the 132nd article; and their Lordships think there can be no doubt that there was such a charge. It is a charge upon specific property, namely, the property specified in the decrees. On that ground their Lordships are of opinion that the decision of the High Court ought to

J. C.
1887
GIRISH-CHUNDER MAITI v. RANI ANUNDMOYI DEBI.

be affirmed, and the appeal dismissed, and they will therefore humbly advise Her Majesty accordingly. The Appellant will pay the costs of the appeal.

Solicitors for the Appellant: *Lambert, Petch, & Shakespear.*
Solicitor for the Respondent: *H. Treasure.*

J. C.*
1887
July 15.

MUSAMMAT RAJESWARI KUAR . . . DEFENDANT;

AND

RAJ BAL KRISHAN . . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Practice—Evidence—Books of Plaintiff put in by Defendant.

Where a Plaintiff rested his case upon a bond executed by the Defendant and upon the recitals contained therein, and the Defendant called for the Plaintiff's books and sought to shew from them that a portion of the moneys covered by the bond had not been advanced:—

Held, that the books must be admitted *in toto*, and that those items which made in favour of the Plaintiff could not be rejected for want of corroboration.

APPEAL from a decree of the High Court (March 21, 1884), varying a decree of the Subordinate Judge of *Benares* (March 19, 1883), and decreeing in full the suit of the Respondent.

The suit was brought by the Plaintiff on the 3rd of February, 1882, to recover Rs.16,144 principal and Rs.7733 interest due on a bond mortgaging a taluk called *Uchagaon Karotha*, which was executed by the Defendant's deceased husband, *Rajhubans Sahai*, to the Plaintiff's deceased father, *Rai Narain Das*, on the 9th of July, 1869, to secure payment of Rs.20,000 on the 9th of July 1874, with interest at 6 per cent. per annum.

The execution of the bond was not disputed, nor the liability of the obligor to pay Rs.13,000 out of the total amount of Rs.20,000, which is admitted in the bond to have been previously due with interest thereon, but the Defendant's contention was that the remaining sum of Rs.7000, which is stated in the mortgage bond to have been borrowed from *Rai Narain Das* for the settlement

* *Present:* —LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

and disposal of the claim for monthly allowance of one *Vilayati Begum*, not having been applied to that purpose, the Plaintiff was bound to prove that it had been paid to or expended for other purposes of *Rajhubans Sahai*, and that he had not so done.

The Subordinate Judge, by an interlocutory proceeding, threw the burthen on the Plaintiff of proving that the amount in question of Rs.7000, which appeared by his books of account produced in Court not to have been paid over to *Rajhubans* at the time of the execution of the bond, had been in fact subsequently paid, and by his judgment disallowed out of that amount as insufficiently proved one item of Rs.1000 entered in the Plaintiff's books as paid for Government revenue of the mortgaged estate on the 6th of July, 1869 (*i.e.* three days before the date of the bond), a second item of Rs.826.5.6 shewn by the Plaintiff's books to have been transferred on the date of the execution of the bond to the Plaintiff's account in satisfaction of the interest due up to that date upon the previous debt, and various other items, aggregating Rs.1673.10.2, together with interest on those amounts, and gave Plaintiff a decree for the rest of his claim.

The ground on which the Subordinate Judge rejected the proof of the two first of those items was that, having regard to the date of the bond, it seemed highly improbable to him that those items, of which that for Rs.1000 appeared by the Plaintiff's accounts to have been paid to *Rajhubans* three days before the date borne by the bond, and the second, that for Rs.826.5.6, to have been debited to him on that date should have formed part of the Rs.7000 which the bond stated was to be applied to buying up *Vilayati Begum's* claim.

As to the items which went to make the total of Rs.1,673.10.2 disallowed by the Subordinate Judge, they appeared in the accounts as consisting of four items of Rs.973.10.6, 200, 100, and 100 respectively paid to *Rajhubans Sahai*, through a servant by name *Matai*, on dates corresponding with the 27th of July, 1869, the 9th of August, 1869, the 10th of September, 1869, and the 22nd of September, 1869, and a further amount of Rs.200 entered as paid to *Rajhubans Sahai* direct on the 9th of August, 1869, all four amounts being debited to the deposit account of *Rajhubans Sahai* with *Rai Narain Das*, which appears to have had at its

J. C.
1887
MUSAMMAT RAJESWARI KUAR v. RAI BAL KRISHAN.

credit Rs.5138, that is to say, the balance of Rs.7000 after deducting the two sums of Rs.1000 advanced for revenue, and Rs.862 interest on the old debt.

The following is the material portion of the judgment of the High Court:—

"The reasons of the Subordinate Judge for disallowing the items appear to us quite insufficient, and we have no doubt whatever that *Rai Rajhubans Sahai* received the full sum of Rs.7000, of which the above items form portions. The Subordinate Judge dwells chiefly on the admitted fact that the recitals in the bond as to manner in which the sum of Rs.7000 was drawn are opposed to the real facts as alleged by Plaintiff, and to there being no evidence apart from the account books. But, in the first place, there is the bond for the amount; both *Rai Rajhubans Sahai* and *Rai Narain Das* are admitted to have been shrewd men of business, and it is most unlikely that *Rai Rajhubans Sahai* would have for many years allowed the sum for which he had given a bond to remain undrawn. Next, there is the evidence of the Plaintiff's account books. They are the properly kept books of a firm of character and respectability, and have been proved by the gumashta of the firm, and contain particulars of all the items. The circumstance that items in these accounts may not be supported by vouchers in the handwriting of *Rai Rajhubans Sahai* is accounted for by the admission that he and *Rai Narain Das* were very great friends, and the former was not in the habit of requiring from the latter vouchers for every sum he might draw from him, and the Subordinate Judge's objection in respect of the item of Rs.1000 that if it had been paid Plaintiff could produce the receipt, has little force, as it would have been with *Rai Rajhubans Sahai* and not Plaintiff. Moreover, the admitted friendly terms on which *Rai Narain Das* and *Rai Rajhubans Sahai* lived does not allow us to suppose that the former would cheat him by making false entries in his books, and we cannot hold that the claim as to these items fails without at the same time holding that the entries of the items are forged. But this supposition is preposterous, and, indeed, is not suggested by the Subordinate Judge, who, on the contrary, accepted the general correctness of the account books by decreeing the larger portion of the claim in accordance with them."

Raikes, and *Hill*, for the Appellant, contended that the Plaintiff had sued upon a bond the whole consideration of which was admittedly not paid, and that therefore he could at most only recover such sums as he could prove had been paid. The Defendant could not be charged on mere entries of payment in the Plaintiff's book contradicted by the recitals in the bond.

Doyne, for the Respondent, contended that the Defendant was *primâ facie* bound by the admissions as to principal and interest contained in the bond. There was no suggestion of fraud. Both obligor and obligee were capable men of business. There was no suggestion that the Plaintiff's book had been tampered with or interpolated. The Defendant's case rests upon the absence of corroboration of the books which he has himself called for and put in, and which were unnecessary to establish the case of the Plaintiff. No evidence had been given that the books were incorrect or that the recitals in the bond were untrue.

Raikes replied.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

In this case the Appellant and Respondent are the representatives of the original parties to the transaction, but no change of interest or any legal question is raised by their succession to their predecessors, and the case is exactly the same as if the present Plaintiff and Defendant were the original parties themselves.

The Plaintiff sued on a bond for a debt of Rs.20,000, and the nature of that debt is stated on the face of the bond. Rs.13,000 was an old debt, and Rs.7000 was stated to be a new debt contracted at the time of the bond; and the bond stated also what the object of the contract for the new debt was. The Defendant alleges that those recitals are false. In effect he alleges that the bond must be taken as of no value, and that the account between the parties must be taken as between an ordinary debtor and creditor. In the first place it is alleged that the object for which the Rs.7000 is said to be borrowed was not the object, and that the money was not applied to that object. Their Lordships think

J. C.
1887
MUSAMMAT RAJESWARI KUAR v. RAI BAL KRISHAN.

that is a matter of no importance whatever. It may be that the object stated was not the object. It may be that a week afterwards the recipient of the Rs.7000 changed his mind and did not apply the money to the object. It does not signify what the object was. To prove that the Rs.7000 was not actually advanced the Defendant called for the Plaintiff's books of account. Those books of account were produced, and they shewed apparently the whole transaction between the parties, and that the impugned recital was substantially correct. About the old debt for Rs.13,000 there was no question, and the Rs.7000, the new advance, was made out in this way: Rs.1000 was paid for revenue some two or three days before the date assigned to the bond; a sum of Rs.800 odd due for interest was allowed on account and taken as capital; and the remainder, Rs.5000 odd, was credited to the Defendant in the books of the Plaintiff to be drawn as occasion required. Then the books of the Plaintiff shewed that the money was drawn out, and if they are to be taken as evidence in favour of the Plaintiff there is a complete answer to the charge of incorrectness made by the Defendant.

Now what the Subordinate Judge did, was to look whether the items of discharge in the Plaintiff's books were corroborated or not. Where they were corroborated he allowed the discharge, and where they were not corroborated he disallowed them. In doing that their Lordships think that the Subordinate Judge acted on an entirely wrong principle. He acted on a principle which would have been correct if the Plaintiff had relied on his own books as proving his debt; but that was not the case. The Plaintiff relied upon the bond which was executed by his debtor, and unless that bond is displaced there is no answer to the action. It is the Defendant who seeks her defence in the books of the Plaintiff. She calls for the books and extracts her defence out of them, and it would be a monstrous thing if the party sued were allowed to call for the accounts of the Plaintiff, and extract from them just such items as proved matters of defence on her part, and were not to allow those items which make in favour of the Plaintiff. The High Court held that the books must be admitted *in toto*. Their Lordships think the High Court were entirely right, and that the decree cannot be complained of on that ground.

Then a much smaller matter was put forward, just at the end

of Mr. *Raikes*' argument on behalf of the Appellant. It appears from the Plaintiff's books that a number of sums were received from time to time by him on behalf of the Defendant. The dates of those receipts are given, and it is alleged that they were not carried into account on those dates as against the principal or the current interest, as it may be, of the bond, so as to discharge the Defendant from interest *pro tanto* from those dates. The principle that they should be so carried into account is a sound one, but their Lordships are exceedingly doubtful whether that principle has been violated, and it certainly is the duty of the Appellant who asks them to modify a decree of the High Court on this point to shew them clearly that it has been violated. Their Lordships find that the Plaintiff's gumashta, who is the battle-horse of the Defendant on this matter, was not asked a question on the subject, and it may have been that if he had been asked questions he might have shewn that in taking the interest account the receipts were credited on the right dates; or he may have given some other explanation of the mode in which the account was made out. That the parties were in habits of very great intimacy is shewn by the gumashta, and it is also shewn that the Defendant's predecessor was a shrewd careful man of business, and it is unlikely that he should not have known how his own account was standing with the Plaintiff. His own books are not produced, so that their Lordships do not know whether he himself would have given any different account of the transactions. Moreover, it does not appear that this point was raised before the High Court, and even if it were raised as late as the appeal to Her Majesty, it is raised in so obscure a way that it requires Mr. *Raikes*' explanation to understand how it was raised at all.

Under these circumstances their Lordships must say that, although the principle contended for by Mr. *Raikes* is a sound one, they have no evidence before them that the decree contains any violation of it. They therefore think that the decree appealed from should be affirmed, and the appeal dismissed with costs, and they will humbly advise Her Majesty to that effect.

Solicitors for Appellant: *Oehme & Summerhays.*

Solicitors for Respondent: *T. L. Wilson & Co.*

J. C.*
1887
July 20.

RANI JANKI KUNWAR . . . . . PLAINTIFF;

AND

RAJA AJIT SINGH . . . . . DEFENDANT.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH, LUCKNOW.

Law of Limitation—Act XV. of 1877, *Art.* 91—*Suit to set aside Deed.*

In a suit brought in 1884 by the Appellant and her husband to have a deed executed in 1872 by the husband set aside on the ground of mental incompetence, an unconscionable bargain, and undue influence:—

Held, that as all the facts relied upon were known to the husband from the date of the deed, and he was not shewn to be a man (however weak in intellect) incapable of having that knowledge, and of allowing it to operate upon his mind, the suit was barred by Act XV. of 1877, art. 91.

APPEAL from a decree of the Judicial Commissioner of *Oudh* (April 24, 1885), reversing that of the District Judge of *Rae Bareli* (June 30, 1884), and dismissing the Appellant's suit with costs.

The object of the suit was to obtain "cancellation of a deed of sale, dated the 29th of July, 1872," by which the Plaintiff *Raja Bijai* had conveyed, for a consideration of Rs.125,000, to the Respondent forty-six villages, with their hamlets, and to recover back those properties, on the ground that the Respondent had obtained that deed at an inadequate consideration, by fraud and undue influence, exercised upon the vendor, who was a man of weak mind and body, and incapable of "discerning and discovering the fraud and deception practised upon him."

The Appellant *Rani Janki* was joined in the suit with her husband, on the allegation of his having made to her on the 1st of November, 1879, a gift of his properties, and she further alleged that she had thereupon, along with her husband, instituted a previous suit against the Respondent to set aside another conveyance of other properties, executed by her husband to the Respondent in May, 1879, in which she and her husband had

* *Present*:—LORD HOBHOUSE, SIR BARNES PEACOCK, SIR JAMES HANNEN, and SIR RICHARD COUCH.

succeeded in the Courts of *Oudh*, whose judgments bore date respectively the 31st of May, 1881, and the 17th of January, 1882, on the ground of his "incompetency to transfer property," and that she had then, on the 25th of August, 1882, come to know of the frauds practised by the Respondent in obtaining the deed which is the subject of the present suit.

The Respondent by his written statement traversed the Plaintiffs' allegations as to fraud and undue influence, and alleged that the consideration paid and applied to the discharge of pressing incumbrances on the Plaintiffs' estate was its "proper value"; and by the 9th paragraph he submitted that the Plaintiffs' suit was barred by limitation under arts. 91, 95, and 114 of the Second Schedule of the *Limitation Act of* 1877, and was also barred under the 43rd section of the Procedure Code, relating to splitting of causes of action.

Mayne, C. W. Arathoon, and *M. A. Jalil*, for the Appellant.

Graham, Q.C., and *Doyne*, for the Respondent.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The Appellant in this appeal is the widow of *Raja Bijai Bahadur Singh*, one of the talookdars of *Oudh*, who died on the 17th of June, 1884. The question in the suit relates to the validity of a deed of sale executed by him on the 29th of July, 1872. By that deed he professed, on account of the exigency of payment of debts to bankers and decree holders, and of revenue, to sell to the Respondent *Raja Ajit Singh*, forty-six villages, with fifty-six hamlets, in consideration of Rs.1,25,000. Before this transaction took place, proceedings in lunacy under the law for that purpose in *India*, had been taken against him, which originated in a letter of the Deputy Commissioner of the 7th of January, 1871. An inquiry was made into the state of his mind, which ended in an order being made on the 6th of November, 1871, by which he was found not to be of unsound mind and incapable of managing his affairs, and upon that he was put into the management of his affairs.

J. C.
1887
RANI JANKI KUNWAR v. RAJA AJIT SINGH.

Now it is important to observe that this was not long before the making of the deed of sale, being in November, 1871, and the deed of sale being dated on the 29th of July, 1872. So that, although he was, and has been found in some subsequent suits to be, a man of weak intellect, he was at that time considered by the proper authorities, who had made inquiries, to be capable of managing his affairs, and therefore he must be taken to have been capable of entering into contracts, and of knowing the nature of the contracts which he entered into. In 1878 he executed a deed of mortgage to the Respondent *Ajit Singh*, and in 1879 he also executed a deed of sale to the same person. In 1880 two suits were brought, one by *Ajit Singh* against *Bijai* and the Appellant to recover the principal and interest due upon the mortgage, and the other by *Bijai* and the Appellants to set aside the deed of sale on the ground of fraud, undue influence, and want of consideration. It should be mentioned that shortly before those suits were brought *Bijai* had made a deed of gift, dated the 1st of November, 1879, to his wife, the present Appellant, and it is a matter of remark that she relies upon that deed, and has relied upon it all through the proceedings, at the same time setting up that her husband was a man incapable of entering into the other transaction, and of executing the deed of sale of the 29th of July, 1872. These suits went through a considerable course of litigation, and were finally determined in favour of *Bijai* and the Appellant on the 24th of June, 1884, by the judgment of this Committee.

The only material date to be noticed in regard to the different proceedings is that of the first judgment, which was given by the District Judge on the 31st of May, 1881, and the final decision was that the deeds should have effect only as securities for such sums advanced or paid by *Ajit Singh* as should be proved to have been paid to and received by *Bijai Singh* personally, or as *Wahaj-ud-deen*, the manager of his estate, would have been justified in borrowing in the course of a prudent management of it. That was in 1884.

The present suit was brought on the 16th of February, 1884, by *Rani Janki Kunwar* and *Bijai*, who had not then died, against *Ajit Singh*, and the plaint stated that the Defendant *Ajit Singh*

knew that *Bijai* was a person afflicted with mental and bodily infirmities, and had procured him to execute the deed of the 29th of July, 1872, at a considerably low price, namely, Rs.1,25,000, and sought to have that deed set aside on the ground of his being incompetent to execute it, and that it had been obtained by fraud. The plaint also contains this allegation, which is important: "That Plaintiff No. 1"—that is the wife—"then"—that is after the decision of the District Judge, dated the 31st of May, 1881, and that of the Judicial Commissioner, dated the 17th of January, 1882—"commenced to inquire about other matters relating to her husband's property, and on the 25th of August, 1882, she came to know of the real facts of fraud, flattery, undue influence, and other matters relating to the deed of sale of the 29th of July, 1872"—the object of that statement being evidently to shew that the suit was not barred by the law of limitation.

Now, the Act XV. of 1877, art. 91, provides that a suit to set aside an instrument not otherwise provided for, which this is not, must be brought within three years from the time when the facts entitling the Plaintiff to have the instrument cancelled or set aside become known to him.

It is necessary then to see whether the suit has been brought within that period. The suit was brought by *Bijai* in conjunction with *Janki Kunwar*, and the facts which are mainly relied upon are these: It is not alleged that the state of his mind was such that it alone would have been a ground for setting aside the deed of sale, and that he was so incapable of entering into any contract that it must be set aside; the case of the Appellant is, that the value of the property was such that, having regard to the amount that was given for it, Rs.1,25,000, it was an unconscionable bargain on the part of *Ajit Singh*, affording evidence that the transaction was a fraudulent one on his part, and was brought about by the exercise of undue influence by him, and that in fact he procured *Bijai Singh* to be surrounded by persons in his, *Bijai Singh's* interest, and acting for him, and *Bijai* was not in a condition to have, and had not the advice which he ought to have had.

Now these were facts which must have been known long before

J. C.
1887
RANI JANKI KUNWAR v. RAJA AJIT SINGH.

the date which the Plaintiff gives as the date of the fraud having come to her knowledge. It is not alleged that any new matter was then discovered. The state of things which existed when the deed of sale was given continued up to the time when the other suits were finally decided. The suit to set this deed of sale aside was originally brought by *Bijai* himself as well as his wife. They do not seem to have thought that the deed of gift could be solely relied upon. *Bijai* brings the suit himself, and therefore when considering whether it is barred by the law of limitation, their Lordships have to see what was the state of *Bijai's* knowledge; because if all the facts were known to *Bijai*, and he was a man not incapable of having that knowledge and of allowing it to operate on his mind, the case would come within what is stated in this article. Much more than three years would have elapsed after the facts which are said to constitute the fraud were known to him, and so the period of three years had expired before the suit was brought. That would be sufficient to decide the suit.

Both the lower Courts seem to have treated this question in a manner which cannot be regarded as satisfactory. The District Judge having stated the previous proceedings, says:—"Under these circumstances I think it but just that she"—that is, the present appellant—"should be allowed to count her limitation from the 31st of May, 1881, the date on which the District Judge decided her husband had been defrauded in the cases then before him." He takes no notice of the fact that *Bijai* was also a party to the suit, and that his knowledge was a material matter to be regarded, and he fixes, apparently in a somewhat arbitrary manner, on the 31st of May, 1881, the date of the decision of the District Judge in the former suits, as that from which the period of limitation would run. That ground cannot be supported. The District Judge has not directed his mind to the real question, which is when the circumstances that are said to constitute the fraud became known to *Bijai*. Then the Judicial Commissioner deals with the case in a different way. He says the suit is essentially a suit for the possession of immovable property, and as such falls within the twelve years' limitation. Now he is clearly wrong there. It was not a suit for the possession of immovable property in the sense to which this limitation of twelve years is

applicable. The immovable property could not have been recovered until the deed of sale had been set aside, and it was necessary to bring a suit to set aside the deed upon payment of what had been advanced, namely, the Rs.1,25,000. Therefore there has been on the part of the lower Courts a misapprehension of the law of limitation in this case. Their Lordships are clearly of opinion that the suit falls within art. 91 of the Act XV. of 1877, and is therefore barred.

Upon the other question, which is the main question in the suit, whether upon the facts which have been proved there was a case entitling the Appellant to have the deed of sale set aside, their Lordships have not had any matter laid before them which would lead them to the conclusion that the decision of the Judicial Commissioner that the deed ought not to be set aside should not be allowed to stand. They see no ground for thinking that on that matter he came to a wrong conclusion.

The result, therefore, is that their Lordships will humbly advise Her Majesty to dismiss the appeal, and to affirm the judgment of the Judicial Commissioner. The Appellant will pay the costs of this appeal.

Solicitors for Appellant: *T. L. Wilson.*

Solicitors for Respondent: *Lawford, Waterhouse, & Lawford.*

J. C.*
1887
July 21.

IN THE MATTER OF SOUTHEKUL KRISHNA ROW.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER AT COORG.

Legal Practitioners Act, XVIII. of 1879, *ss.* 14, 40—*Irregularity in Procedure—Right of Practitioner to be heard after Report made.*

Proceedings having been taken before the Commissioner of *Coorg* against a pleader under the *Legal Practitioners Act*, XVIII. of 1879, s. 14, for professional misconduct, a report was made to the Judicial Commissioner that he should be removed from the roll, and the Judicial Commissioner made an order to that effect without hearing the pleader.

A later order was made that the pleader might adduce evidence before the Commissioner. He did so, and the evidence was remitted to the Judicial Commissioner, who confirmed his previous order, again without hearing the pleader:—

Held, that there had been irregularity under sect. 40 of the Act, that the order must be set aside, and the pleader restored to the roll.

APPEAL from two orders of the Judicial Commissioner (Feb. 28, 1883, and July 28, 1883). The first order directed that the name of *Southekul Krishna Row* be struck off the roll of the second grade pleaders, and his certificate cancelled, and the second confirmed that order.

The facts are stated in the judgment of their Lordships.

Special leave to appeal therefrom was granted by an order of Her Majesty in Council dated the 26th of November, 1886.

C. W. Arathoon, for the Appellant, contended that there had been irregularity, and that under sect. 40 of Act XVIII. of 1879 the Judicial Commissioner had not the power to suspend or dismiss the Appellant without allowing him an opportunity of defending himself before that authority. There was no evidence of fraud or professional misconduct; or if of any, it was not of a nature sufficient to justify the extreme sentence imposed.

* *Present*:—LORD HOBHOUSE, SIR BARNES PEACOCK, SIR JAMES HANNEN, and SIR RICHARD COUCH.

The judgment of their Lordships was delivered by

SIR JAMES HANNEN:—

This is an appeal by one *Krishna Row* against an order of the Acting Judicial Commissioner of *Coorg*, Mr. *Plumer*, by which he struck the name of the Petitioner off the roll of second grade pleaders in the Courts of *Coorg*.

The facts out of which the appeal arises are as follows. One *Nanjappa* had instituted a suit in which he had been unsuccessful. He had appealed once, and he desired to appeal again. The present Appellant, who was at that time a vakil, was going to *Bangalore*, and he was requested by *Nanjappa* to give instructions to a barrister of the name of *Meenakshaya*, at *Bangalore*, to take such steps as might be necessary for this appeal; and on the 27th or 29th of January, 1880, *Nanjappa* remitted to the Appellant a sum of Rs.80 for stamps and Court fees. It appears that the Appellant did, in accordance with the directions he had received from *Nanjappa*, hand over the papers relating to the case, and the Rs.80, to Mr. *Meenakshaya*. Mr. *Meenakshaya* was at that time about to leave *Bangalore* for two or three days, and he took the papers with him. He appears to have left on the 1st of February. On the 2nd of February the Appellant, either in consequence, as he says, of a telegram from *Nanjappa*, or of his own motion, went to the office of *Meenakshaya* and there saw one of his clerks. There is a question as to what information he received from that clerk with regard to the appeal. The Appellant says that he was told in answer to his inquiry that the appeal might have been filed, by which their Lordships understand him to mean that as Mr. *Meenakshaya* was away, the clerks did not know what had been in fact done, but that it might have been filed by him before he left. The clerk, however, gives a different account of the transaction, and says that all he said was that the appeal might be filed when Mr. *Meenakshaya* returned. Whichever of those two statements is correct it does not justify, literally, the telegram which the Appellant sent to *Nanjappa*, because he telegraphed to him "Appeal filed Saturday; hearing not fixed." From his own point of view of the facts, it would appear that he assumed that the appeal had been filed, whereas,

J. C.
1887
IN THE MATTER OF SOUTHEKUL KRISHNA ROW.

as he admits, all the information he received was that it might have been filed. That certainly is an inaccurate telegram. But the first question which underlies all these proceedings is whether or not it was a fraudulent statement by him that the appeal had been filed on Saturday. Now as he had handed over the papers and the Rs.80 to Mr. *Meenakshaya*, who had taken the papers out of town for the purpose of considering what should be done, it does not appear that there could have been any motive for the Appellant's telegraphing falsely and fraudulently that the appeal had been filed, and it would appear more natural to come to the conclusion that there had been some misunderstanding on his part, or that he incautiously and improperly telegraphed as a fact that that had been done which the clerk had stated was probable. It has been suggested by the Commissioner who has finally reported on the case that he may have anticipated the events which did subsequently occur, namely, that Mr. *Meenakshaya* would return the money, and so he would have an opportunity of appropriating it, or some of it. That is taking a very hostile view of his conduct, and their Lordships are not prepared to say that the facts lead with any degree of certainty to so adverse a conclusion. But as a matter of fact the Appellant did receive back from Mr. *Meenakshaya* the papers and Rs.60, Mr. *Meenakshaya* retaining Rs.20 as his fee for advising upon the case. The Appellant did not, as he ought to have done, hand over that Rs.60, or at any rate as much of it as he considered should be paid after deducting some reasonable sum for his own expenses. He did not in fact hand over any. In the following December, Mr. *Hayes*, a barrister, was instructed by *Nanjappa* to write to the Petitioner asking him to render an account of the money which he had received back from *Meenakshaya*. The Petitioner wrote to Mr. *Hayes* saying that he was entitled to retain Rs.20. He also said :—"After my return to this place *Nanjappa* never asked for the money. If he had done so, I was ready to pay him Rs.40, after deducting Rs.20 which Mr. *Meenakshaya* had retained, and Rs.20 for my travelling expenses. Such being the case, I was astonished to see your letter." He did not, however, remit the money to *Nanjappa*, but he alleges that on the following 28th of February, 1881, he paid

a sum of Rs.30 to Mr. *Hayes*, which, together with another sum of Rs.10, which he had previously given him, made up a sum of Rs.40, on account of this claim of *Nanjappa;* and by way of proving that, he produced a letter from Mr. *Hayes* which simply demands payment of Rs.30, and upon which letter the Appellant states that he made a memorandum of those two payments of Rs.30 and Rs.10, making up the Rs.40 which he had expressed his willingness to pay in his letter to Mr. *Hayes.*

There is a dispute upon this, as upon almost every other fact of the case. Mr. *Hayes* denies that he received that money on account of *Nanjappa;* but it is quite certain that there were money transactions between Mr. *Hayes* and the Appellant, and it is not impossible to believe that this sum of Rs.40 was paid by the Petitioner to Mr. *Hayes* on account of *Nanjappa.*

In that state of things *Nanjappa* instituted proceedings against the Petitioner of a criminal nature. When those proceedings came on for hearing a compromise was arrived at by its being agreed that *Nanjappa* should receive the whole Rs.80 back again. There is a question how that Rs.80 was made up. The Appellant says that half of it was paid by Mr. *Hayes*, the other half being furnished by him. Mr. *Hayes*, however, denies that he furnished anything, and represents that the whole of it was paid by the Appellant under fear of the proceedings that had been taken against him. A compromise was effected by the receipt of the Rs.80 by *Nanjappa.* But although the claim of *Nanjappa* was thus put an end to, proceedings were afterwards instituted —the proceedings which are now the subject of appeal before this Board—against the Appellant in his character of pleader and officer of the Court. Those proceedings took place before Colonel *Hill*, who is the Commissioner of *Coorg.* It does not appear very clearly what led to the institution of those proceedings, but it is unnecessary to inquire into their origin, as if it became known to an officer presiding in a Subordinate Court that one of the practitioners before that Court has been guilty of unprofessional conduct, it would be within the scope of his duties to take steps for the purpose of having that matter adjudicated upon. That would properly take place under the 14th section of the *Legal Practitioners Act*, No. XVIII. of 1879, which provides that:—

J. C.
1887
IN THE MATTER OF SOUTHEKUL KRISHNA ROW.

"If any such pleader practising in any Subordinate Court is charged in such Court or office with any such misconduct"—that is (referring back to the preceding section)—"in the discharge of his professional duty," then that certain steps shall be taken. The presiding officer is to send him a copy of the charge, and also a notice that on a day to be thereby appointed such charge will be taken into consideration. Ultimately it becomes the duty of such officer, if he finds the charge established, and considers that the pleader should be suspended or dismissed in consequence, to record his finding and the grounds thereof, and to report the same to the High Court, and the "High Court may acquit, suspend, or dismiss the pleader or mukhtar."

A report was made to Mr. *Plumer*, the acting Judicial Commissioner, who in this respect represents the High Court. The Acting Judicial Commissioner has given the two orders which are the subject of appeal in this case. The first was on the 28th of February, 1883, when he makes the order with this preface:—"In the matter of the recommendation made by the Commissioner of *Coorg* for the removal of the name of *Southekul Krishna Row* from the roll of second grade pleaders for his having defrauded one *Ramashetty Nanjappa* of *Mercara*." He goes on to say that the record of the case before him shewed clearly that *Krishna Row* received Rs.80, and that he fraudulently omitted to repay it, and also that he made a false statement that he had paid his client a portion of the money through Mr. *Hayes*. Then coupling that with alleged previous misconduct, he comes to the conclusion that he ought to be struck off the roll.

Up to that time it is to be observed that the Petitioner had not been heard before Mr. *Plumer*. Petitioner remonstrated upon the order that had been made, and the result was another order of the 5th of June, 1883. That is, that evidence shall be adduced by the Appellant, and evidence was in fact taken before Colonel *Hill*. Their Lordships are of opinion that the Petitioner had the opportunity of adducing such evidence as he might think fit, and that his complaint on that head is not well founded. But upon the evidence so obtained being remitted to the Judicial Commissioner, he makes this report or order:—"I have gone very carefully again through all the papers connected with this

case, and I have given them my best consideration. I regret that I am unable to modify the opinion expressed in my previous order, or to alter the conclusion I arrived at." He therefore concludes "I confirm my former order striking Petitioner off the rolls."

This order was made without the Petitioner's having had the opportunity of being heard before the acting Judicial Commissioner after the evidence had been taken, and in that respect their Lordships are of opinion that there has been a plain irregularity, because in whatever way the proceedings may be instituted, they are subject to the provision of the 40th section of the Act referred to, by which it is enacted that, "notwithstanding anything hereinbefore contained, no pleader shall be suspended or dismissed under this Act unless he has been allowed an opportunity of defending himself before the authorities suspending or dismissing him." Now, the only authority which could suspend or dismiss him was the High Court, represented by the acting Judicial Commissioner, Mr. *Plumer*, before whom he never has had an opportunity of defending himself. Their Lordships are therefore of opinion that this order directing that he be struck off the rolls is in that respect irregular, and that it must be set aside, and the Petitioner be restored to the roll.

It is unnecessary to give a definite opinion upon the merits of the case, but their Lordships consider that if the charge had been established in a regular way, the offence, as alleged against the Petitioner, was not of a character which called for his entire removal from the profession, but that a suspension for less time than that which he has in fact undergone would have been sufficient to meet the merits of the case.

Their Lordships will therefore humbly advise Her Majesty to set aside the order appealed from, and to order that the Petitioner be restored to the roll.

Solicitors for the Appellant: *T. L. Wilson & Co.*

J. C.* MEENAKSHI NAIDOO . . . . . APPELLANT;

1887

AND

June 14, 16. SUBRAMANIYA SASTRI . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Act XX. of 1863, *s.* 10—*Committee of Pagoda—Duty of District Judge—Jurisdiction of High Court—Appeal—Act X. of* 1877, *s.* 540.

A right of appeal from the decision of a Judge must be given by statute or an equivalent authority.

Act XX. of 1863 having vested in the District Judge a discretionary authority under certain circumstances to fill up a vacancy in the committee of a pagoda:—

Held, that neither sect. 10 of Act XX. nor sect. 540 of Act X. of 1877 gave a right of appeal from the exercise of such authority.

The question of the High Court's jurisdiction not having been raised before that Court:—

Held, that the right to raise it had not been waived. There was inherent incompetency in the High Court to deal with the question before it; and consent could not confer on the High Court a jurisdiction which it never possessed.

Ledgard v. *Bull* (Law Rep. 13 Ind. Ap. 134) followed.

APPEAL from a decretal order of the High Court (Nov. 11, 1881) reversing an order of the District Judge of *Madura* (Feb. 10, 1881), by which the Judge acting under the powers given to him by Act XX. of 1863 had appointed the Appellant to fill up a vacancy which had occurred in the Meenakshi Sundvasaal Devastanam, or temple.

The ground on which the High Court proceeded in making the order appealed against was that as the devastanam, or temple, in question was admittedly devoted to the worship of the god *Siva*, and the appellant had "pronounced himself actively in favour of the cult of *Vishnu*," he, though otherwise unexceptionable, was not a proper person to direct the concerns of such a temple.

The facts are sufficiently stated in the judgment of their Lordships. The question decided was as to the power of the High

* *Present*:—LORD HOBHOUSE, SIR BARNES PEACOCK, SIR RICHARD BAGGALLAY, and SIR RICHARD COUCH.

Court to entertain an appeal from the order of the District Judge.

Mayne, upon this point, contended that under Act XX. of 1863 the District Judge did not make the appointment complained of as a judicial officer. He is directed thereby to act in an executive capacity if the managers of the temple neglect to act. He is a *persona designata* as a referee under the circumstances which have happened, it is not his Court which is vested with a jurisdiction. He makes an executive order, not a decree. For definition of decree, see Act X. of 1877, s. 2. If it be a decree or decretal order within the meaning of the Procedure Code no appeal is given by the Code, and the High Court has no inherent right to entertain an appeal. See sects. 588 and 622; *Rajah Amir Hassan Khan* v. *Sheo Baksh Singh* (1). [*Doyne*: Sect. 647 is material, and 622 is materially altered by Act XII. of 1879 and amended by Act XIV. of 1882.] Reference was made to *Ajonnissa Bibi* v. *Surjakant Acharji* (2); *Ex parte Sankar Dobay* (3); *Sandback Charity Trustees* v. *North Staffordshire Railway Company* (4). The case of *Anthony* v. *Dupont* (5) is the only case in which an appeal has been practically allowed when it is not given by statute, and an order has been reversed under sect. 622 without an application from a party. It is not to be relied upon. Appeals do not lie to the High Court against orders made under sect. 18 of Act XX. of 1863: *In re Venkateswara* (6). If the High Court had no jurisdiction at all to entertain the appeal, no waiver of this point in the Court below would operate. Express consent of the parties would not give jurisdiction to a Court which did not possess it by law, and still less would the consent implied by waiver do so. A party may waive objection to the irregular exercise by the Court of a jurisdiction which it possesses over the subject-matter of the suit. If it was irregular as to time, place, or person within the knowledge of a respondent who did not object, he would be bound by his waiver. Not so when the Court

(1) Law Rep. 11 Ind. Ap. 237.
(2) 2 Beng. L. R. (A.J.) 181; see also 217, 301.
(3) 4 Beng. L. R. (A.J.) 65; and see also 5 Beng. L. R. Ap. 59.
(4) 3 Q. B. D. 4.
(5) Ind. L. R. 4 Madras, 217.
(6) Ind. L. R. 10 Madras, 98.

J. C
1887
MEENAKSHI NAIDOO v. SUBRAMANIYA SASTRI

was acting *ultra vires*, and the whole proceeding is *coram non judice*. Reference was made to *Ledgard* v. *Bull* (1).

Doyne, for the Respondent, was called upon in reference to the question of jusisdiction which was to precede any discussion as to the merits of the order complained of. No objection was taken to the jurisdiction of the High Court until an application was made for a certificate that the case was fit for appeal to Her Majesty in Council. The Appellant had previously thereto filed an application for review which was argued, and no objection was taken to the jurisdiction. On the contrary, the Appellant had invoked the jurisdiction. Reference was made to sect. 561 of Act X. of 1877. With regard to the contention that the High Court has no jurisdiction in appeal except in suits, and in reference to decretal orders where it is expressly given by statute, it was contended that the High Court had a general jurisdiction inherited from the Sudder Dewany Adawlut and a power of superintendence given to it by the Charter and *Charter Act*. Reference was made to Regulation V. of 1802—the preamble. The superintending power involves jurisdiction in appeal, and gives a right to appeal except when it is taken away. Reference was made to Act VIII. of 1859, s. 337. An appealable decree is any formal expression of an adjudication: see Act XII. of 1879, s. 2. In Act XX. of 1863, ss. 3, 4, and 5, shew the distinction between an application and a suit. The order here falls under sect. 622 of Act X. of 1877; and it was a decree within Act XII. of 1879. [SIR RICHARD COUCH:—If an appeal had been intended to be given it would probably have been to the Commissioner. It is much more an executive than a judicial matter.]

The counsel for the Appellant was not called on to reply.

1887
June 16

The judgment of their Lordships was delivered by

SIR RICHARD BAGGALLAY:—

This is an appeal against an order of the High Court of *Madras* which cancelled an order of the District Judge of *Madura* ap-

(1) Law Rep. 13 Ind. Ap. 134.

pointing the present Appellant to fill up a vacancy in the committee of a pagoda in the *Madras* Presidency.

The appointment was made by the District Judge under the provisions of sect. 10 of Act XX. of 1863, entitled "An Act to enable the Government to divest itself of the management of religious endowments," and commonly known as the *Pagoda Act*. By that Act it was provided that the local government should appoint one or more committees in every division or district to take the place, and to exercise the powers of, the Board of Revenue and the local agents, under the regulations thereby repealed, that the members of such committees should be appointed from among persons professing the religion for the purposes of which the temple, or other religious establishment, was founded or should be maintained, and in accordance, so far as could be ascertained, with the general wishes of those who were interested in the maintenance of such temple or religious establishment, and that the appointments should be for life. Sect. 10 provided for supplying vacancies in the following terms: "Whenever any vacancy shall occur among the members of a committee appointed as above, a new member shall be elected to fill the vacancy by the persons interested as above provided. The remaining members of the committee shall, as soon as possible, give public notice of such vacancy, and shall fix a day, which shall not be later than three months from the date of such vacancy, for an election of a new member by the persons interested, as above provided, under rules for elections which shall be framed by the local government, and whoever shall be then elected under the said rules shall be a member of the committee to fill such vacancy. If any vacancy as aforesaid shall not be filled up by such election as aforesaid within three months after it has occurred, the Civil Court, on the application of any person whatever, may appoint a person to fill the vacancy, or may order that the vacancy be forthwith filled up by the remaining members of the committee, with which order it shall then be the duty of such remaining members to comply; and if this order be not complied with the Civil Court may appoint a member to fill the said vacancy."

The interpretation clause provided that the expression "Civil

J. C.
1887
MEENAKSHI NAIDOO v. SUBRAMANIYA SASTRI.

Court" should mean the principal Court of original civil jurisdiction in the district in which the temple was situated.

The committees appointed under the Act appear to have varied in number; in the case under consideration a committee of five was originally appointed. There had been changes from time to time, and, on the 4th of September, 1880, *Gurusami*, one of the then five members of the committee, died.

The period of three months expired on the 6th of December, 1880, and several applications were thereupon made to the District Judge at *Madura* to take such course as he might deem advisable. He accordingly issued a notice that, unless an election was held before the end of the year, he would take the matter into his own hands. An election did in fact take place on the 28th of December, 1880, and at such election, tellers, appointed by the District Judge, attended and reported to him the result; the present Appellant obtained the largest number of votes, and by an order of the District Judge, dated the 10th of February, 1881, was appointed to fill the vacancy in the committee. As the three months from the death of *Gurusami* had expired before the election, the power and the duty of appointing his successor had devolved upon the District Judge; the object of the Judge in permitting an election to take place after the expiration of the three months was, as he states, to satisfy his own mind as to who would be the proper person for him to select.

The Judge having appointed the Appellant on the 10th of February, 1881, a petition of appeal was presented to the High Court by persons who were either interested as candidates, or were in favour of other candidates. The substantial grounds of the appeal were, that the *Madura Temple* was devoted to the worship of *Siva*, and that the present Appellant was a Vishnuite. The High Court, agreeing with the Petitioners, discharged the order of the District Judge.

From that order of the High Court the present appeal is brought; and the question has now been, for the first time, raised whether the High Court had jurisdiction to deal by way of appeal with the order of the District Judge. It should be mentioned that after the High Court had decided adversely to the present Appellant, a petition of review was brought before

that Court, and they declined to further interfere. During the proceedings in the High Court it was never suggested that that Court had no jurisdiction to deal with the question until an application was made for leave to appeal to the Queen in Council, when it was inferentially stated; it was, however, then too late for the High Court to entertain the question.

On the 4th of March, 1884, leave was given to the Appellant by Her Majesty in Council to enter and prosecute his present appeal.

When the appeal was opened, it appeared to their Lordships desirable that the question of the jurisdiction of the High Court to entertain an appeal from the order of the District Judge should be first taken into consideration, as, if that objection should prevail, it would be unnecessary to go into the disputed questions by which the merits of the case were surrounded; and with the question of jurisdiction alone their Lordships now propose to deal.

In approaching the consideration of this question, their Lordships cannot assume that there is a right of appeal in every matter which comes under the consideration of a Judge; such right must be given by statute, or by some authority equivalent to a statute. The first question which arises in the present case is, whether any right of appeal is given by the *Pagoda Act* itself. There is nothing in the Act which would suggest it, unless it is to be found in sect. 10, to the terms of which their Lordships have already referred. Sects. 14 to 20 of the Act provide for the interference of the Court by way of suit in certain cases, but they are entirely limited to cases which may be classified as breaches of trust or neglect of duty. There is no other provision whatever for the institution of suits in the *Pagoda Act* itself. In the opinion of their Lordships the 10th section places the right of appointing a member of the committee in the Civil Court, not as a matter of ordinary civil jurisdiction, but because the officer who constitutes the Civil Court is sure to be one of weight and authority, and with the best means of knowing the movements of local opinion and feeling, and one can hardly imagine a case in which it would be more desirable that the discretion should be exercised by a person acquainted with the district and with all the surroundings. The exercise of the discretion being so placed

J. C.
1887
MEENAKSHI NAIDOO v. SUBRAMANIYA SASTRI.

in the District Judge their Lordships are unable to find anything in the 10th section which confers a right of appeal.

It has, however, been suggested that, though there may be no right of appeal under the *Pagoda Act* itself, yet a right of appeal must be found in the general law, and their Lordships' attention has been particularly directed to the 540th section of Act X. of 1877, which gives a general right of appeal from decrees of Courts exercising original jurisdiction; the jurisdiction conferred by the Code (sect. 10) is to try suits of a civil nature. The Act of 1877 contained, in its interpretation clause, a declaration of the meaning of the word "decree," as used in that Act, but this interpretation was modified by Act XII. of 1879, and, as modified, the interpretation is as follows: –

"'Decree' means a formal expression of an adjudication upon any right, claim, or defence, set up in a civil Court where such adjudication decides the suit or the appeal."

In the opinion of their Lordships there was no civil suit respecting the appointment, and it would be impossible to bring an order made by the District Judge pursuant to sect. 10 of the *Pagoda Act* within the definition of a decree as contained in the Code, and no other general law has been suggested. Mr. *Doyne*, in the course of his argument, contended that if a person, very improper and unfit by reason of his religious qualifications or moral conduct, was appointed, there must be a right, either by appeal against the Judge's order, or by suit, or in some other way, to remove the person so appointed. There is force in this argument; but whether a person so improperly appointed could, as has been suggested, be removed by proceedings equivalent to proceedings by *quo warranto* in *England*, or whether, upon a full consideration of the merits, the Appellant could be considered as a person improperly appointed, are questions upon which their Lordships are not called upon to express an opinion. In their opinion it is clear that there is no appeal from that which was a pure discretion vested in the District Judge.

It has been suggested, and it is not right altogether to pass that suggestion over, that, by reason of the course pursued by the present Appellants in the High Court, they have waived the right which they might otherwise have had to raise the question

of want of jurisdiction. But this view appears to their Lordships to be untenable. No amount of consent under such circumstances could confer jurisdiction where no jurisdiction exists. Upon this point it may be convenient to refer to the judgment of their Lordships delivered by Lord *Watson* in the comparatively recent case of *Ledgard* v. *Bull* (1), as it in very concise terms deals with the circumstances under which there can be a waiver of a right to complain of a want of jurisdiction. Their Lordships say: "The Defendant pleads that there was no jurisdiction in respect that the suit was instituted before a Court incompetent to entertain it; and that the order of transference was also incompetently made. The District Judge was perfectly competent to entertain and try the suit if it were competently brought; and their Lordships do not doubt that in such a case a defendant may be barred by his own conduct from objecting to irregularities in the institution of the suit. When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot by their mutual consent convert it into a proper judicial process, although they may constitute the Judge their arbitrator, and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties without objection join issue, and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the ground that there were irregularities in the initial procedure which, if objected to at the time, would have led to the dismissal of the suit." In the present case there was an inherent incompetency in the High Court to deal with the question brought before it, and no consent could have conferred upon the High Court that jurisdiction which it never possessed.

Having regard to all the circumstances of the case, their Lordships will humbly advise Her Majesty to allow the appeal, to discharge the order of the High Court, and to dismiss the appeal to the High Court without costs. There will be no costs of the present appeal.

Solicitors for the Appellant: *Gregory, Rowcliffes, & Co.*

Solicitor for the Respondent: *R. T. Tasker.*

(1) Law Rep. 13 Ind. Ap. 144.

J. C.*
1887
June 14.

MYLAPORE . . . . . PLAINTIFF;

AND

YEO KAY AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE COURT OF THE RECORDER OF RANGOON.

Limitation—Act XV. of 1877, *art.* 140—*Title alleged by the Plaint—Admission —Sect.* 19.

Where a Hindu Plaintiff sued as devisee under a will, his suit is barred by art. 140 of Act XV. of 1877 unless brought within twelve years from the date of the testator's death.

If the case made by the plaint is expressly or impliedly an absolute title under a will, the Plaintiff cannot inconsistently therewith set up a title paramount to that which the Defendant had derived from the testator in his lifetime and by adverse possession.

Eschenchunder Singh v. *Shamachurn Bhutto* (11 Moore's Ind. Ap. Ca. 7) followed.

An admission contemplated by sect. 19 is an admission to the Plaintiff or some one claiming under him.

APPEAL from the decree of the Court of the Recorder (June 24, 1884), dismissing the Appellant's suit with costs.

The suit was brought on the 12th of September, 1883, to obtain a declaration that the Appellant was entitled, in his own right and as executor to the estate of *Mooroogasum Moodliar* and as administrator to the estate of *Kristnasawmy Moodliar*, to possession of two-fifths of certain land and buildings in *Rangoon*, and a partition thereof, with all necessary orders and directions.

The facts of the case and the nature of the title set up in the plaint are stated in the judgment of their Lordships.

At the trial evidence was adduced, both orally and in writing, upon both sides, but no evidence was tendered by the Appellant that either he or *Kristnasawmy Moodliar* had at any time, either before or after the death of *Mooroogasum Moodliar* on the 19th of September, 1864, been in possession of or in receipt of the rents or profits of any portion of any of the said land and buildings.

* *Present*:—LORD HOBHOUSE, SIR BARNES PEACOCK, SIR RICHARD BAGGALLAY, and SIR RICHARD COUCH.

The Recorder found as a fact that one *Bennett* was, at the date of his purchase, on the 24th of April, 1871, and had been for some time previously, in possession of the properties, and held that the Appellant's suit was barred under art. 140 of the second schedule to the *Limitation Act.*

Mayne, and *Laing*, for the Appellants, contended that the suit was not barred. By virtue of the manner in which *Bennett* was holding in 1871, and from that date till the date of his own conveyance in 1874, the law of limitation did not apply. While he held he did so on account of all parties concerned. The property was that of a joint family, *Bennett* was entitled to his share and had a lien on the shares of others, but he was not in adverse possession and practically admitted to that effect in his conveyance of 1874. There was no adverse possession therefore against the Respondents, and by the Appellants for a period of twelve years before suit. Reference was made to Act XV. of 1877, sect. 19, and arts. 140, 144.

Rigby, Q.C., and *Young*, for the Respondents, were not called on.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

The learned Judge in this case has decided that the suit was barred by limitation under the 140th, or the 124th article of the second schedule of the *Limitation Act*, XV. of 1877. He stated that, in his opinion, it is barred by art. 140. Their Lordships are of opinion that the learned Judge was right in the conclusion that the suit was barred by art. 140 of that Act.

In order to ascertain whether the suit was so barred or not, we must look to what was the nature of the case which the Plaintiff made.

By the Act of 1882, which was the Civil Procedure Code in force when the suit was commenced, the Plaintiff must shew the grounds, &c., the cause of action, and when that cause of action accrued.

In the case of *Eshenchunder Singh* v. *Shamachurn Bhutto* (1), Lord

(1) 11 Moore's Ind. Ap. Ca. 7.

J. C.
1887
MYLAPORE
v.
YEO KAY.

Westbury, who delivered the judgment, said: "This case is one of considerable importance, and their Lordships desire to take advantage of it for the purpose of pointing out the absolute necessity that the determination in a cause should be founded upon a case, either to be found in the pleadings, or involved in, or consistent with, the case thereby made."

Now what is the case made out by the pleadings, or what is involved in, or consistent with, the claim which is thereby made? The Plaintiff alleges in the plaint that *Mooroogasum* died on the 19th of September, 1864, having made a will, the sixth paragraph of which was in the words following: "all the rest, residue, and remainder of all my property, moveable and immoveable, of which I may die possessed (all being my own sole earning, and none having come to me from my father's estate) be divided equally between my five brothers, share and share alike." The five brothers included *Vyapoory*, the present Plaintiff, and *Kristnasawmy*, another brother, to whose interest in the estate *Vyapoory*, the Plaintiff, claims to have succeeded; he therefore claims to have two of the five shares devised by *Mooroogasum*. He rests his title upon *Mooroogasum's* will, and claims that the will gave him a right to recover possession, and to have a declaration of his right to possession of two-fifths of the estate, and also to have a partition. He does not allege in distinct terms that *Mooroogasum* had an estate in this property, but it is to be implied from, or rather involved in, the statement which he made in the plaint. At paragraph 16 of the plaint he says: "*Coomarasawmy* and *Soobaroy*"—those are two of the other brothers—"had no right, power, or authority, to sell more than their respective one-fifth shares in the land, set out in paragraph 7 of this plaint. But when he says that they had no right to sell more than their two shares, it implies that they had the right to sell those two. Then he says in paragraph 18, "that there remains undivided the respective one-fifth shares or interests of *Vyapoory*"—that is the Plaintiff himself—"and *Kristnasawmy*, deceased, in each of the several pieces or parcels of land set out in paragraph 7 of this plaint." He could not have been entitled, nor could his brother have been entitled, to one-fifth, unless the testator had the property to dispose of; and then, having made out, or professed to

make out, a title under the will, he declares that he is entitled to possession of those two-fifths, and he asks to have it declared that he is entitled to them, and to have a partition of the estate.

Now when did his title arise, assuming that the testator had the estate, and had the power to devise it? It arose on the death of *Mooroogasum* on the 19th of September, 1864. The Judge in his judgment puts it one year later, and says he must at least have had a title at the expiration of one year from the death of the testator. It appears to their Lordships that according to the Hindu law he became entitled to his one-fifth on the death of the testator.

The words of art. 140 are: "suit by a remainderman, or a reversioner (other than a landlord), or devisee for possession of immoveable property"—which this is: he is claiming as a devisee of immoveable property. Then it says the suit is to be brought within twelve years from the time when his estate falls into possession. Now, from 1864 he was entitled to possession, but Mr. *Bennett* had the possession; and it is said now that Mr. *Bennett* had not an adverse possession, because he was holding as in the nature of a mortgagee, and that the testator was not absolutely entitled to the estate. There is nothing, however, in the plaint from which anything of that kind can be inferred. It is to be inferred that the case rests upon the title of the testator to devise the estate, and upon that title only.

The issues are: "(1.) Does the plaint disclose a good or sufficient cause against the Defendants, or any or either of them?" It does not strictly shew a good cause of action, for there is no allegation that the testator was entitled; but whatever cause of action it does shew is a cause of action derived from the will of the testator and from the death of the testator, and the title accrued at that time. Then comes the issue No. 2:—"Is the Plaintiff's claim, or any portion thereof, barred by limitation?" Now, if his title accrued in 1864, then it is clear that the judgment of the learned Judge was correct, and that the suit which was not brought till the 12th of September, 1883, is barred.

Then it was contended that, by virtue of sect. 19 of the *Limitation Act*, an admission had been made which gave a further period

J. C.
1887
MYLAPORE
v.
YEO KAY.

from which the right of bringing the action was to be dated. Sect. 19 is this: "If, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing, signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed." But what liability does this mean? It must mean a liability to the person who is seeking to recover possession, or some person through whom he claims. Was there any admission made in this case by Mr. *Bennett* at any time, or by any of the Defendants? The admission is said to have been made by Mr. *Bennett* in the conveyance which was executed in 1874. It is contended that in that conveyance Mr. *Bennett* admitted that he was liable in respect of the property. The only admission is, that he was acting as agent for one of the executors in selling the estate. He was selling the estate for the purpose of getting paid out of the proceeds of the sale. He does not admit that he was liable to be turned out of possession, or that anyone had a right of possession as against him, nor does he make any admission at all to the Plaintiff or to anyone through whom he claims. Under those circumstances the clause does not apply. No liability has been admitted to take the case out of the *Statute of Limitations*; and under those circumstances art. 140 must prevail, and the decision of the learned Judge was correct upon that point.

Under these circumstances their Lordships will humbly advise Her Majesty to affirm the decision of the Court below, and to dismiss the appeal. The Appellant must pay the costs.

Solicitors for Appellant: *Frank Richardson & Sadler.*
Solicitors for Respondents: *Sanderson & Holland.*

BABU BINDESHRI PARSHAD . . . . PLAINTIFF;

AND

MAHANT JAIRAM GIR . . . . . DEFENDANT.

J. C.*

1887

June 16, 17.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Act I. of 1877—*Specific Performance—Condition Precedent—Warranty of Title.*

Where a purchaser delayed payment of the purchase-money of immoveable estate, insisting upon the insertion in the conveyance of an absolute warranty of title by the vendor to the property sold:—

Held, that as a right to such covenant was not shewn, his delay of payment was not excused, and there was no case for decreeing specific performance.

APPEAL from a decree of the High Court (June 23, 1884), affirming a decree of the Subordinate Judge of *Allahabad* (June 9, 1883), dismissing the Appellant's suit.

The facts are stated in the judgment of their Lordships.

The Subordinate Judge was of opinion that failure to pay the balance of the purchase-money within the fifteen days named in the agreement was fatal to the Plaintiff's suit. The High Court considered that the Defendant sold and the Plaintiffs bought the rights and interests of the Defendant whatever they might be, that the Plaintiffs had notice of there being certain claims on the estate, and that a guarantee of title by the Defendant had never been within the contemplation of the parties. Consequently no case was made for exercising the discretionary power of the Court to grant specific relief under Act I. of 1877.

Cowie, Q.C., and *C. W. Arathoon*, for the Appellant, cited Dart's Vendors and Purchasers, ed. 1876, p. 1037; *Joynes* v. *Statham* (1); *Lindsay* v. *Lynch* (2); *Ramsbottom* v. *Gosden* (3).

Doyne, for the Respondent, was not called on.

* *Present*:—LORD HOBHOUSE, SIR BARNES PEACOCK, SIR RICHARD BAGGALLAY, and SIR RICHARD COUCH.

(1) 3 Atkyns, 388. (2) 2 Sch. & L. 9.
(3) 1 V. & B. 168.

J. C.

1887

BABU BINDESHRI PARSHAD v. MAHANT JAIRAM GIR.

June 17. The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The Appellant in this case, and the Respondent, on the 3rd of October, 1882, entered into an agreement for the sale of an estate which is described in the agreement as *Ilaka Dabha*. The agreement is very short, and is in these words:—"Out of Rs.10,075 (ten thousand and seventy-five) at which it has been settled by *Mahant Jairamgir* to convey *Ilaka Dabha* to *Babu Bindeshri Parshad*, Rs.200 (two hundred) have been received as earnest money, through *Lala Chhedi Lal* and *Mata Parshad Malwai*. The balance, viz., Rs.9875 (nine thousand eight hundred and seventy-five), exclusive of costs, will be received in cash within fifteen days, and then I will execute the sale deed and get it registered. The purchaser will bear the costs on account of the stamp paper and the registration and mutation fees. I will have nothing to do with them. I will take the entire amount in cash. If the balance is not paid within fifteen days the earnest money will be forfeited, and the vendor will be at liberty to sell the *Ilaka* or not."

On the 16th of October the following letter was written to the Appellant: "My dear *Mahant Jairaimgir*,"—after compliments—"I beg to say that you contracted with me to sell the zamindari of taluqa *Dabha*, pargana *Kiwai*, zilla *Allahabad*, for Rs.10,075, and accepted Rs.200 as earnest money. The draft of the sale deed is also ready. However, you make excuses in executing the sale deed. It is thirteen days since you were paid the earnest money. You have also sent to me the stamp, but nobody appears on your behalf to write and complete the sale deed. I have over and over again sent my man to you, but you have put the matter off from day to day. As I have some misgivings in the matter, and I am ready to pay the money and have the sale deed executed by this writing, I request you to duly execute the said sale deed in accordance with the corrected draft, and accept the money from me as soon after the receipt of this as possible." It is stated in the statement of the pleader who was examined by the Subordinate Judge before the settlement of the issues that this notice was served on the 18th of

October, "and about three or four days after this, the aforesaid draft of the sale deed was sent to *Madho Chanbay*, Defendant's gumashta at *Mirzapur*. The draft was not sent to the Defendant's gumashta within the term of fifteen days." It is stated afterwards that there was some mistake as to that date, and it would seem that the draft of the sale deed was sent three or four days before the 18th, probably on the 14th of October. As sent to the Defendant, it contained this clause:—"Should a stranger now or hereafter acquire any other title in the property sold, or any kind of flaw arise, I, the vendor, my heirs and assigns, shall in every way be responsible therefor. The vendee shall, at all events, be at liberty, if any such contingencies arise, to seek his relief in the Civil Court and realise his losses and damages from me, the vendor, from my person and property, and that of my heirs and assigns, together with interest and costs incurred in the Court; and to this I will have no objection whatever," thus requiring the Defendant to give an absolute warranty of title to the property which was sold. The Defendant objected to this, and struck out this clause, and it would seem that he substituted for it a clause to the following effect:—"Should any kind of dispute arise, whether now or hereafter, on my part, or that of my heirs or assigns, in the property sold, I, the vendor, and my heirs will be responsible therefor," and the draft thus altered was returned to the Plaintiff. The Defendant appears to have thought that the Plaintiff was entitled to this, but their Lordships are not prepared to hold that such a contract of sale as this gave the purchaser a right to insist on any formal covenants such as the practice of English lawyers has attached to an English contract of sale if that is what was in the minds of the parties.

The Plaintiff, the purchaser, was not satisfied with this. After the 18th of October there appears to have been some correspondence or negotiation between the parties with respect to the receipt of some outstanding rents, and it is said that a letter was written on the 30th of October, but that letter does not appear in the proceedings. The Plaintiff insisted upon having in the sale deed the agreement or covenant which had been inserted being an absolute warranty of title; and on the 4th of December he

J. C.
1887
BABU BINDESHRI PARSHAD v. MAHANT JAIRAM GIR.

brought his suit in the Court of the Subordinate Judge of *Allahabad*, in which, after stating the contract and the payment of the earnest money, he alleged that "the Defendant did not perform the aforesaid contract, and when the Plaintiff saw that the Defendant delayed in the complete execution of the deed in question, he requested the Defendant to have the deed completely executed and registered by means of a written and registered notice on the 16th of October, 1882," and that he sent the draft on the 18th of October, 1882, which, as has been stated, was admitted to be a mistake. Then he said: "the Plaintiff has all along shewed readiness to have the contract completely performed as far as he himself was concerned;" and prayed that a judgment might be passed ordering the Defendant to execute and get registered a sale deed in favour of the Plaintiff in respect of the property claimed, by entering a guarantee of good valid title.

Now there he distinctly claimed to have the contract performed by having this warranty of title; and when he says that he was ready to have the contract completely performed, as far as he himself was concerned, it must be taken that he was ready to have it performed in that way.

The case went for trial before the Subordinate Judge of *Allahabad*, and he, in his judgment, came to the conclusion that the time fixed for the payment of the balance of the purchase-money was material, and that the Plaintiff had not paid the purchase-money at the time fixed, and no valid excuse had been shewn for his not doing so, and consequently he was not entitled to have a decree, and he dismissed the suit. It then went by way of appeal to the High Court, and it is important to see what the Plaintiff insisted upon when he made his appeal to the High Court. In his memorandum of appeal, he said that he appealed because the Appellant had done all that lay in his power within the stipulated period to secure the due execution and completion of the sale contract which had been previously accepted in unqualified terms by the Defendant, the Respondent; because there is ample evidence to prove that the Appellant could not deposit with the Respondent the balance of the consideration money in consequence of the refusal of the latter to execute a proper conveyance with a warranty of good title," distinctly insisting then on his

right to have a warranty of good title; and, "because upon the facts admitted by the Respondent himself, the (Plaintiff) Appellant is entitled to an equitable decree for his claim," namely, the claim for a deed with a warranty of good title. It has been suggested that the Plaintiff was willing to take a decree upon the terms which it was said the Defendant admitted he was liable to perform, namely, to have a sale deed with a qualified covenant; but there is no evidence that at any time before this stage of the case the Plaintiff had in any way submitted or shewn his willingness to take any other sale deed than one with a warranty of title. The pleader was examined and there is no trace of any willingness to do this.

When the case came before the High Court, it went into a consideration of some evidence, which in its opinion showed that the agreement between the parties was different from that which was stated in the writing; that all that the Defendant undertook to sell, and the Plaintiff contracted to buy, were the rights and interests of the Defendant, whatever they might be; that it was known to them that the subject-matter of the agreement was the right and interest of certain persons, and that the vendor could not be expected to give any absolute warranty of title. Their Lordships have not gone into this evidence, and therefore express no opinion as to the ground upon which the High Court rested their judgment. They came to the conclusion, upon the oral evidence, that it was not a proper case for a decree for specific performance.

The question which has now to be considered, is, whether the decree of the Subordinate Judge dismissing the suit ought to stand; and the position of the parties appears to be this: that the Plaintiff has all along, until he saw that the judgment of the High Court was likely to be given against him, been insisting upon having the sale deed with the warranty of title; and it is admitted by his learned counsel at the bar that he had no right to any such covenant. It has not been attempted to be shewn that he had. Thus he was insisting upon having that which he had no right to have, and he delayed performing his part of the agreement for the payment of the purchase-money on that account. Under such circumstances as these, it certainly is not a case in

J. C.
1887
BABU BINDESHRI PARSHAD v. MAHANT JAIRAM GIR.

which it would be right for this Committee to advise Her Majesty to make any decree for specific performance.

The cases to which their Lordships have been referred are very different from this. They are cases where apparently the plaintiff has been willing to submit to have the agreement which was actually proved performed. Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed, and the decree of the High Court affirmed, and the Appellant will pay the costs of this appeal.

Solicitors for Appellant: *T. L. Wilson & Co.*
Solicitors for Respondent: *Pyke & Parrott.*

J. C.*
1887
June 30; *July* 1, 9.

ROBERT WATSON & CO. . . . . DEFENDANTS;

AND

SHAM LAL MITTAR . . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Guardian and Ward—Contract by Guardian—Presumption.

Where a Hindu widow executed kabullyats as "mother of *S. L. M.*, minor":—

Held, that she must be considered, in the absence of sufficient evidence to the contrary, as contracting as the mother and guardian of her infant son. It cannot be presumed that she was claiming the estate adversely to her son who was legally entitled; the presumption would rather be that she acted in her lawful capacity.

APPEAL from a decree of the High Court (Sept. 12, 1884), which in part reversed a decree of the Subordinate Judge of *Midnapore* (May 12, 1882).

The object of the Respondent's suit was to establish his right to hold, at their original rents, two tenures, in two villages called *Kuilibadi* and *Gilabani*, lying within the Defendants' putni estate, pergunnah *Bogri*, unaffected by certain decrees for enhancement of rent of the same, which the Appellants had during his, the

* *Present*:—LORD HOBHOUSE, SIR BARNES PEACOCK, SIR RICHARD BAGGALLAY, and SIR RICHARD COUCH.

Plaintiff's minority, obtained in respect of the said mouzahs against the Plaintiff's mother, *Haimabati*, and one *Pearimoni Dasi*, and also unaffected by the kabuliyats for the enhanced rent subsequently given by the Plaintiff's mother.

And the Plaintiff also sought to set aside a summary decision of the Subordinate Judge, of the 18th of August, 1880, by which the Subordinate Judge had rejected a claim made by the Plaintiff under the *Bengal Rent Act*, VIII. of 1869, sect. 63, in the matter of the execution of decrees for rent of *Kuilibadi* and *Gilabani* obtained by the Appellants against *Haimabati*, and held the tenure liable to pay the enhanced rent; and the Plaintiff asked to recover back from the Defendants various sums, aggregating Rs. 800-1-5, which the Plaintiff had on various dates deposited in Court in satisfaction of decrees obtained by the Appellants against *Haimabati* for the enhanced rent, and to prevent the sale of the tenures in execution of those rent decrees.

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The first Court held that, as to the moiety of the tenures which at the time of the passing of the decrees for enhancement had belonged to *Pearimoni Dasi*, the Plaintiff was liable to pay the enhanced rent, but not so as to the other moiety then held by the Plaintiff's mother, *Haimabati*, inasmuch as the suit for enhancement was brought, and the decree obtained, in respect of this latter moiety, not against the Plaintiff, who was then an infant, personally, but against his mother who held that moiety at that time on behalf of her son and not of herself, and that therefore a decree against her personally did not bind her infant son as to that moiety, nor did the kabuliyats which she subsequently gave to the Defendants, and by which she agreed to pay the enhanced rents.

And the Subordinate Judge held also that the Plaintiff was entitled to recover back the sum paid by him into Court, in satisfaction of the rent decrees against *Haimabati*.

The High Court concurred with the first Court that the Plaintiff was not bound by the decrees against his mother, as he was not a party to the suits for enhancement, nor by the kabuliyats given by her, and that as to the decree against *Pearimoni Dasi*, she was not bound thereby, nor was the Plaintiff who derived title from her, inasmuch as the rent of the tenures was whole

J. C.
1887
WATSON & Co.
v.
SHAM LAL MITTER.

and undivided, and could not therefore be enhanced as to one moiety. The High Court expressed no opinion as to the right of the Plaintiff to recover back the moneys deposited by him in Court, in the rent suits against *Haimabati*, but simply dismissed the Appellants' appeal.

Upon the question decided in this appeal, viz., whether the Plaintiff was bound by the kabuliyats which had been executed by his mother and guardian during his infancy for both mouzahs; the material part of the High Court's judgment was as follows:—

"In respect of the Defendants' appeal, in which it is contended that the Court ought to have held that *Haimabati* was the real tenant of the estate, even after her son's birth, and that all the transactions in which she was treated as the real tenant are binding on the Plaintiff, we have, with much regret, come to the conclusion that we cannot sustain that view. The Plaintiff having admittedly come into existence before the litigation commenced, ought undoubtedly to have been made a party to the suits. And we find it impossible to say that he is bound by the result of that litigation. His mother, *Haimabati*, who was sued as tenant, had really no interest in the tenures after her son's birth. There is evidence to shew that the Defendants or their agents had knowledge of the Plaintiff's birth, and therefore they must be held to have had abundant opportunity of bringing him on the record. Possibly in those days the necessity was not so fully recognised as it is now of making the real owner a party to the suit, even though he be an infant, and can only be represented through a guardian. But we are bound to apply the law as it is now understood, however hard to the individual the consequences may be.

"It has been contended that the suit is barred by limitation because it was not brought within three years after the Plaintiff had arrived at majority. We think, however, that the lower Court has rightly disposed of this plea in holding that the suit is not barred. The suit was not brought to set aside anything done by the Plaintiff's guardians during his minority, for all that was done by them in the enhancement suits, and in the giving of the kabuliyats afterwards, was without any reference to his existence at all. He was simply ignored. His suit was for a declaration,

and his immediate cause of action was the rejection of his claim in the execution proceedings. We must, therefore, confirm the findings of the lower Court as to the Plaintiff not being bound by any of the transactions to which his mother, *Haimabati*, was a party. But having come to this conclusion we also find it impossible to hold with the lower Court that the Plaintiff is bound by the enhancement decrees because he purchased from *Pearimoni*. No doubt if *Pearimoni* was bound the Plaintiff was bound also. But as matters stand, it appears that *Pearimoni* herself could not be bound by the decrees in question. The mouzahs constituted undivided tenures. A suit for enhancement could only be for the enhancement of the whole undivided rent, and a decree obtained, not against the true tenants of these tenures, but against one true tenant as to one share and against a person who is not interested as to the other moiety could not, we think, be effectual.

"As regards those tenures, *Haimabati* was nobody at all at the time the suits were brought, and *Pearimoni* represented a half share only. It seems to us, therefore, that the decrees obtained under these circumstances were of no force at all against *Pearimoni* or against the Plaintiff, who claims through her. The inevitable result is that we must hold the Plaintiff to be free from liability either under the decrees of 1861, or the subsequent kabuliyats of 1865 and 1867, and maintain that for the present he is liable to pay only the previous rents of the mouzahs.

"The appeal of the Defendants must therefore be dismissed, but under the circumstances without costs, and on the appeal of the Plaintiff we must declare that the Plaintiff is not liable at present to pay anything more than the rents existing before 1861."

Sir *Horace Davey*, Q.C., and *Doyne*, for the Appellants, contended that this judgment was wrong, and also that the judgment of the First Court was wrong so far as it declared that the moiety of the lands which the Plaintiff had inherited from his father was not liable to enhancement of rent, and that the Plaintiff was entitled to recover Rs.7800 from the Appellants. As regards the entirety of the tenures, they were bound by the decrees which had been obtained by the Appellants against the tenants whose

J. C.
1887
WATSON & CO.
v.
SHAM LAL MITTER.

names were recorded in their serishta, and by the kabuliyats subsequently given by *Haimabati*. *Haimabati* was the mother and guardian of the Plaintiff, and he is bound by all decrees obtained against and kabuliyats given by her during his minority. *Peari Dasi* would also have been bound by the decrees had she retained her interest, and the Plaintiff is bound to pay in respect of her moiety the whole of the undivided rent which by the decrees was fixed upon the entire mouzah. Reference was made to *Ramchunder Chuckerbutty* v. *Brojonath Mozumdar* (1); *Hunoomapersaud Panday* v. *Mussamat Babooee Munraj Koonweree* (2); Reg. V. of 1799, sect. 2, and the preamble. Act XL. of 1858, sect. 3, defined the guardian's power as to defending suits.

Mayne, and *C. W. Arathoon*, for the Respondent, contended that the estate was not bound by the decrees against *Haimabati*. She did not profess to act and was not supposed to be acting as her son's guardian in any of the dealings relating to the estate which took place between her and the Appellants during her son's minority. There was no ambiguity in the kabuliyats which she executed, and no words which shewed that she was contracting as agent or guardian on behalf of others. See notes to *Thomson* v. *Davenport* (3); *Priestley* v. *Fernie* (4). There is nothing but a personal liability in these kabuliyats, and an agent cannot bind both himself and his principal. He is either one or the other, and *Haimabati* bound herself; and, except as guardian to her son, she was a mere stranger to the estate subsequent to his birth. Decrees against her and contracts by her did not therefore bind the estate. The Appellants, moreover, by their conduct were estopped from asserting that *Haimabati* represented the Respondent and therefore the estate. She obtained possession, was registered and recognised by them as *Gopinath's* heir and successor, and all their dealings with her were in her own right and not as representing the Respondent. Reference was made to *Waghela Rajsanji* v. *Shekh Masludin and Others* (5).

The counsel for the Appellants were not called on to reply.

(1) Ind. L. R. 4 Calc. 929.
(2) 6 Moore's Ind. Ap. Ca. 393.
(3) 2 Sm. L. C. 8th Ed. p. 397.
(4) 3 H. & C. 977.
(5) *Ante*, p. 89.

July 9. The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The Plaintiff in this suit and Respondent in the appeal is a tenant of two mouzahs, named *Kuilibadi* and *Gilabani*, under the Defendants and Appellants, who are putnidars of pergunnah *Bogri*. The principal object of the suit was to obtain a declaration that the Plaintiff is not bound by two decrees for enhancement of the rent of those mouzahs obtained in January, 1861, against *Srimati Haimabati* and *Srimati Peari Dasi*, and by kabuliyats given by *Srimati Haimabati* to the putnidars in January, 1867. The Plaintiff also asked for a declaration that the mouzahs were not liable to have the rent enhanced, and that the Defendants might be required to refund to him the sum of Rs.7800 1. 5. gundahs, the amount paid by him to prevent the sale of the mouzahs, in execution of decrees obtained by the Defendants against *Srimati Haimabati*. It has been found by both the lower Courts that the mouzahs were liable to an enhanced rent, and so that question is no longer in dispute.

The mouzahs were originally held by *Jaggut Mundal Saontal* and *Soonder Mundal Saontal*, and by a succession of transfers they came into the possession of *Kasinath Ghose*. He on the 17th of September, 1850, sold one moiety of them to the Plaintiff's father, *Gopinath Mitter*, and about the same time made a gift of the other moiety to his wife, *Srimati Peari Dasi*. *Gopinath* died in October, 1858, leaving his widow *Haimabati*, who on the 10th of May, 1859, gave birth to the Plaintiff. On the death of *Gopinath*, *Haimabati* appears to have entered into possession of his estate, and to have been recognised by the Defendants as tenant. On the 16th of May, 1859, immediately after the birth of the Plaintiff, the Defendants caused notices of enhancement to be served upon *Haimabati Dasi* and *Peari Dasi*, and on the 17th of June, 1859, they instituted two suits against them for enhancement of rent, one as to each mouzah. On the 18th of November, 1860, whilst the suits were pending, *Peari Dasi* sold her moiety to *Haimabati*, who is described in the deed of sale as "mother and guardian of *Sham Lal Mitter*, minor," and it is apparent from the deed that the purchase was made on his behalf. No change, however, was made in the suits.

J. C.
1887
WATSON & Co
v.
SHAM LAL MITTER.

On the 26th of January, 1861, the Defendants obtained a decree in each suit against *Haimabati Dasi* and *Peari Dasi* declaring that they had the right of enhancement, but the rate of enhancement was to be determined after local investigation. This was made, and by an order dated the 25th of June, 1861, the rent of *Kuilibadi* was fixed at Rs.529. 14. 14 gundahs, and of *Gilabani* at Rs.675. 2. 13. 2 cowries. Soon after this, on the 26th of September, 1861, a compromise was made between the Defendants and *Haimabati* for payment by instalments of what was due on account of *Gilabani*. In 1865 the Defendants appear to have caused a re-survey to be made of the mouzahs, and *Haimabati* on the 3rd of September, 1865, executed two dowl settlements of land and jumma, one of each mouzah. In these the rents fixed by the decrees are stated, and also a rent for other lands which had apparently come under cultivation, or for which rent might be claimed. The additional rent was Rs.270. 3. 0. for *Gilabani* and Rs.114. 8. 0. for *Kuilibadi*. These documents are both signed "*Haimabati Dasi*, mother of *Sham Lal Mitter*, minor." On the 28th of January, 1867, *Haimabati* executed two kabuliyats, one for each mouzah, signed in the same way as the dowls in which the rent fixed by the decree for enhancement is stated, and also the additional rent named in the dowl, together with a small sum for other land, and she agrees to pay the rent by instalments, year by year. Probably there was some land which had become subject to pay rent since the dowls were executed.

The Plaintiff attained his majority on the 10th of May, 1877. On the 16th of July, 1877, he deposited in Court Rs.35. 1. 15. gundahs for rent of *Gilabani*, the Defendants having refused to take it, and on the 19th of January, 1878, the Defendants presented a petition, in which they stated that the name of *Sham Lal Mitter* was not registered in their serishta, and he was not a tenant of *Gilabani* mouzah; that *Haimabati Dasi* held under them 3579 bighas 17 cottahs 8 chittacks of land in *Gilabani* mouzah on an annual rental of Rs.946. 13. 13. 2 cowries, and the name of *Haimabati* was registered in their serishta, and therefore they were not bound to take the money in deposit. About this time they appear to have brought suits against *Haimabati* for arrears of rent. They are numbered 2 and 3 of 1878, but the date of the filing of the plaints does not appear in the record of proceedings.

The judgment in each was given on the 2nd of December, 1878, and it states that the defence of *Haimabati* was that she executed the kabuliyat upon which the suit was based, not in her personal capacity, but as guardian of her then minor son, *Sham Lal Mitter*, and, as he had become a major, the suit ought to be instituted against him, and not against her. An issue was settled on this allegation, and the Subordinate Judge, adopting the translation of her signature which has been given, held that the words used in the kabuliyats did not themselves convey the meaning contended for by the Defendant, viz., that *Haimabati* executed the instrument as guardian of her minor son, and made a decree in both suits for the amount claimed.

The Defendants proceeded to execute the decrees, and the mouzahs having been attached, the Plaintiff made a claim under sect. 63 of Act VIII. of 1869, which was rejected by the Subordinate Judge on the ground that the claimant's name was not registered in the serishta of the Defendants, the Judge saying that he "ought to bring a suit in the usual way to find out whether he was bound to pay the former rent, and whether the payment of the enhanced rent of the jote was binding on him." The 10th of January, 1881, was fixed for the sale, and on that day the Plaintiff paid into Court the whole amount due under the decrees, whereupon it was ordered that the sale be stayed. The present suit was instituted on the 11th of February, 1881, the sums so paid being what is sought to be refunded. The substantial question in the suit is whether the Plaintiff is bound by the decrees for enhancement obtained against *Haimabati* and *Peari*, or by the kabuliyats. It was admitted by the learned counsel for the Appellants that he is not bound by the decree as against *Haimabati*, but they contended that he is bound by it as against *Peari*, having purchased her moiety during the suit, and that it made him liable to pay the whole of the enhanced rent. Upon this question the lower Courts have differed. The learned counsel relied upon the kabuliyats as being executed by the Plaintiff's mother, who was his natural guardian, upon the absence of any suggestion that the enhancement of rent was otherwise than proper. At the close of the argument for the Appellants their Lordships intimated to Mr. *Mayne*, who appeared for the

J. C.
1887
WATSON & CO.
v.
SHAM LAL MITTER.

Respondent, their wish that they should first hear his argument upon the effect of the kabuliyats. Having done that they have come to a conclusion which makes it unnecessary to hear any further argument.

The addition to *Haimabati's* name of the words "mother of *Sham Lal Mitter*, minor," must, in their Lordships' opinion, be considered as meaning that she was contracting as the mother and guardian of her infant son. Undoubtedly, the statement of the Appellants in their petition of the 19th of January, 1878, and their suing *Haimabati* after the Plaintiff's coming of age for rent due partly before and partly after that time, are weighty evidence against their present contention, but the evidence amounts only to admissions by them that *Haimabati* was the tenant, and no fact is proved which would make the admissions conclusive against them. The evidence of the dowls and kabuliyats has to be considered, and their Lordships think that outweighs the admissions. It is to be observed that this evidence is treated rather lightly by both the lower Courts. The Subordinate Judge does not notice the addition to the signature, and says, "these kabuliyats were executed by the Plaintiff's mother not as his guardian but for herself. They cannot therefore bind the Plaintiff. It has been held in previous rent suits based upon these kabuliyats, that the Plaintiff's mother granted them in her personal capacity, and was liable for rent." The judgment of the High Court in the statement of facts merely says, "Subsequently, in 1865 and 1867, *Haimabati*, not professedly as guardian of the Plaintiff but in her own name, gave kabuliyats to the putnidars."

It cannot be presumed that *Haimabati* claimed the estate adversely to her son and the substance of the case is that the estate being under her management as his natural guardian, and the Appellants being able to sue for an enhancement of the rent, she came to what appeared to be and she was advised was a proper arrangement with them. If there were any doubt as to the capacity in which she acted it should be presumed that she did so in her lawful capacity. As the other questions in the appeal have not been argued on behalf of the Respondents, their Lordships give no opinion on them. They will humbly advise Her

Majesty that the decrees of both the lower Courts should be reversed, and a decree be made dismissing the suit, with costs in both those Courts. The Respondent will pay the costs of this appeal.

Solicitors for Appellants: *Freshfields & Williams.*
Solicitors for the Respondent: *T. L. Wilson & Co.*

DOULUT RAM . . . . . PLAINTIFF;

AND

MEHR CHAND AND OTHERS . . . . . DEFENDANTS.

J. C.
1887
July 19.

ON APPEAL FROM THE CHIEF COURT OF THE PUNJAUB.

Execution Sale—Rights of Purchasers—Mortgage by Managing Member of a Hindu Joint Family.

The Plaintiff being mortgagee execution creditor and purchaser at an execution sale of the mortgaged property sued the Defendants for a declaration that his purchase included their shares of the mortgaged property and was not limited to the shares of the mortgagors, who as managing members of the joint family to which the Defendants belonged, and of the joint business in which they were interested, had purported to mortgage the interest of the entire family.

The Defendants refused to join issue upon the facts alleged by the Plaintiff shewing that the mortgage validly bound the ancestral estate and business, but pleaded that they were no parties to either the mortgage or the mortgage suit, and that therefore the decree and execution sale, both of which purported to affect the whole estate to which they related, did not affect their interests:—

Held, that this contention failed, that the case should not be remanded, and that the sale passed the whole estate to which it related.

APPEAL from a decree of the Chief Court (April 4, 1883) affirming a decree of the Commissioner of the *Delhi* Division (March 28, 1881), which affirmed a decree (July 22, 1880) of the Judicial Assistant Commissioner of *Delhi* dismissing the Appellant's suit with costs. The Respondents were members of a joint and undivided family belonging to the sect of the Jains, but subject to the Mitakshara law.

* *Present:*—LORD HOBHOUSE, SIR BARNES PEACOCK, SIR JAMES HANNEN, and SIR RICHARD COUCH.

J. C.
1887
DOULUT RAM v. MEHR CHAND.

The proceedings in the suit and the facts of the case are sufficiently stated in the judgment of their Lordships.

The Judges of the Chief Court held or assumed that the mortgage was necessarily entered into in order to pay the debts of the ancestral business; that the Defendants were managers thereof; that the business belonged to the joint family of which the Defendants, who were minors at the time of the mortgage, were members; that therefore there was a valid mortgage of the entire mortgaged property, including the shares of the Defendants therein, and that the sale was of the entire property. But they held that the Lower Court was right in deciding that the suit on the mortgage in which execution issued was not so framed as to entitle the Appellant to a decree which would bind the interests of all the members of the family, and that the Respondents were not so represented in that suit as to be bound by that decree. They further held that the Appellant was not entitled to prove *aliunde* that the estate of the Respondents was in any way represented in the proceedings. In coming to these conclusions they principally relied upon the fact that it was not the father of the Respondents that had executed the mortgage as managing member, but their uncle and their brother.

They referred to the case of *Ganesh Pandey* v. *Dabi Dyal* (1), in which it was held that "a decree must be taken to be limited strictly as operating against the persons named in it and that only under certain special circumstances, where it is evident on the face of the proceedings that the person named in the decree must necessarily have been sued in a representative character, the Court may treat the decree as if the person represented had been named in it. It follows that a purchaser at an execution sale can ordinarily get no greater rights than the rights of the person named as the debtor in the decree, under which the sale is held. But there are some peculiar cases, arising from the constitution of a joint Hindu family governed by the Mitakshara, in which the effect of an execution sale has been somewhat extended . . . . on the ground that the members of the family, other than the judgment debtor, contesting a sale under a decree, when shewn to be bound to pay the debt, are in equity

(1) 5 Calc. L. R. 36.

not entitled to relief against a *boná fide* purchaser without notice" (p. 38). In that case the decree-holder had purchased in execution of his own decree upon the mortgage bond, and it was held that he could "not claim to be in the position of a third person purchasing *boná fide* without notice." "If it was his intention to charge . . . . all the members of the family . . . . he was bound to frame his suit properly; and he, at least, must have known that it was not so framed."

The conclusion at which the *Punjaub* Chief Court arrived was as follows:—

"The general rule is correctly stated in the extract already given from the case of *Ganesh Pandey* v. *Dabi Dyal* (1), in which both *Madan Thakur's Case* (2) and that of *Suraj Bansi Koer* v. *Sheo Parshad Singh* (3), were referred to; and the exception which has been made when the decree has been properly obtained against the father of a joint Hindu family, under the Mitakshara law, acting as manager of that family, on a mortgage executed by him during the minority of his sons, or with the consent express or implied, of his adult sons, should not, I think, be extended to cases where the mortgagor was not the father, and the mortgagee, knowing that there are other members of the family, sues the mortgagor alone, and afterwards purchases the property at a sale in execution of his own decree. Such a mortgagee has not framed his suit so as to make all the co-sharers in the mortgaged property parties to it, and cannot claim to be in the position of a *boná fide* purchaser without notice."

They also said that they had assumed that there was necessity for the mortgage, but that did not relieve the mortgagee from the necessity, where he seeks to enforce the charge upon the property, of making all the co-sharers, who are all entitled to an opportunity of redeeming the mortgage, parties to the suit.

Graham, Q.C., and *Branson*, for the Appellant, contended that the Chief Court ought to have held that the Appellant had by his purchase at the execution sale acquired a title to the whole

(1) 5 Calc. L. R. 36.
(2) Law Rep. 1 Ind. Ap. 321.
(3) Law Rep. 6 Ind. Ap. 88; Ind. L. R. 5 Calc. 148; S. C. *nom. Ramsahai* v. *Sheo Parshad Singh*, 4 Calc. L. R. 226.

J. C.
1887
DOULUT RAM
v.
MEHR CHAND.

mortgaged property, including the shares of the Respondents. The Appellant had alleged and offered to prove all the circumstances necessary to shew that the mortgage was what it purported to be, a valid and binding mortgage of the entire property comprised therein. The Respondents had practically not disputed that allegation, but had rested their defence on the ground that they were not personally parties to the mortgage, the mortgage suit, and the decree, and that therefore the sale was ineffectual to pass their shares and interest. It was contended that their being personally parties was unnecessary, inasmuch as they were parties through their managing members, who were legally authorized to bind them. Reference was made to *Hunoomanpersaud Panday* v. *Mussumat Babooe Munraj Koonweree* (1); *Bhaishankar Narbheram* v. *Harivallabh* (2); *Deendyal Lal* v. *Jugdeep Narain Singh* (3); *Pettachi Chettiar* v. *Sangili Veera Pandia Chinnathambiar* (4); *Mussamut Nanomi Baluasin and Others* v. *Modun Mohun* (5); *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh* (6); *Ramphul Singh and Others* v. *Deg Narain Singh and Another* (7); *Umbica Prosad Tewary and Others* v. *Ram Sahay Lall* (8); *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (9).

C. W. Arathoon, for the Respondent, contended that only the interest of the judgment debtor passed by the execution sale. Whatever may have been the nature of the debt, the Appellant could not by his purchase have acquired more than the interest of the debtor, whose right and interest alone were affected by the mortgage deed, the suit, the decree, and the sale. The co-sharers were not parties to the mortgage deed, and if the mortgagee sought to enforce the mortgage against them he should have made them parties to the suit, and so have given them an opportunity to redeem. That is especially so when the decree-holder intends himself to become the purchaser. If he intended to buy, he was especially bound to make it clear that the decree bound the mortgagors, as representing the family, and

(1) 6 Moore's Ind. Ap. Ca. 393.
(2) 1 Bombay H. C. R. 20.
(3) Law Rep. 4 Ind. Ap. 247.
(4) *Ante*, p. 84.
(5) Law Rep. 13 Ind. Ap. 1.
(6) Law Rep. 6 Ind. Ap. 233.
(7) Ind. L. R. 8 Calc. 517.
(8) Ibid. 898.
(9) Law Rep. 6 Ind. Ap. 88.

therefore the whole estate, and ought not, by omitting the co-sharers from the suit, to give intending purchasers to understand that only the interest of the judgment debtor was being sold.

The counsel for the Appellants were not called on to reply.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This is an appeal from the decision of the Chief Court of the *Punjaub* in a suit brought by *Doulut Ram* against *Mehr Chand* and others, in order to have it declared that under a purchase which he had made under an execution, he acquired not only a 10-annas share, but also the other 6-annas shares which the Defendants dispute, and also to recover possession of those 6-annas shares. In his plaint he says "that on the 11th of January, 1871, *Jiwan Mal* and *Ratan Chand* mortgaged the property to Plaintiff for Rs.20,000, under the necessity of paying a debt due to the firm known as *Nanak Chand, Surap Chand,* of which Defendants are also the proprietors." There seems to be a mistake in stating that the debt was due to the firm instead of a debt by the firm. He then states "that on the 11th of November, 1878, Plaintiff brought a suit by virtue of the mortgage deed and obtained a decree against *Jiwan Mal* and *Lal Chand,* son of *Ratan Chand.* That in execution of the aforesaid decree, Plaintiff purchased the said property for Rs.44,100 at an auction sale; but when he wanted to take possession, Defendants, who were minors at the time of the mortgage, set up an objection, and on the 23rd of July, 1879, prevented Plaintiff from taking possession of six out of sixteen annas of the property, the value of which is Rs.16,537·8. Then the Plaintiff prayed for a declaration to the effect that the share of the property regarding which the Defendants set up the objection, was held in mortgage by Plaintiff in a lawful manner; and that the Plaintiff purchased the same in execution of the decree."

Now the circumstances of the case are these:—By a mortgage executed by *Ratan Chand* and *Jiwan Mal,* the property in question, with some other property, was mortgaged to the Plaintiff. In their mortgage the two mortgagors, who were members of a

J. C.
1887
DOULUT RAM
v.
MEHR CHAND.

joint family including the present Defendants, stated that they held ancestral possession of the property, that it was purchased and built by them, and that they owned it to the exclusion of everyone else. Then, having stated that the old title deeds were destroyed during the Mutiny, they proceeded:—"In these days we have pledged and given in mortgage this property, with all its rights, internal and external, to *Seth Dulut Ram*, son of *Lala Nanu Ram*"—that is the Plaintiff—"proprietor of the firm known as *Dulut Ram* and *Sri Ram*, bankers." Then they say, in consideration of Rs.20,000 Queen's coin, "under the necessity of paying a debt due to"—it is there also said "due to," but it should be "due by"—"the firm known as *Nanak Chand*, *Sarup Chand*, the proprietors of which are the two of us (promisors) mortgagors (viz. *Ratan Chand*, son of *Nanak Chand*, and *Jiwan Mal*, son of *Sarup Chand*) and also *Mehr Chand*," and the other Defendants. Then they say: "We have given up possession of the mortgaged property in question, and given it into the possession of the mortgagee, after the execution of a separate lease, containing our promise in regard to the interest. Our agreement is that we will pay the interest month by month, and the principal sum in a period of three years."

It appears to their Lordships that although the mortgagors stated that they were the sole proprietors, the statement that they were in ancestral possession shewed that they intended to mortgage the whole of what they held as ancestral property, and that the mortgage passed the whole 16 annas of the property which they professed to mortgage, and they mortgaged it, stating that they did so for the purpose of paying the debt due from their firm. The Defendants stated that they were not members of that firm, and they relied upon that fact. They did not state that no debt was due from the firm, but merely that they were not members of it. If they had intended to say that the mortgage being executed by the managers of the joint family was executed by them for their own private purposes, and not for such as would benefit the whole joint family, they ought to have said so, and they would have said so. But instead of saying there was no necessity for the mortgage, they say it was a mortgage for a debt of a firm of which they were not members.

Then there was a second mortgage afterwards executed to which the Defendants were parties, in which it was stated that "whereas the whole of our property, consisting of shops and houses situated in the city of *Delhi*, being ancestral property belonging to our common ancestor *Nanak Chand*, is already mortgaged to *Lala Doulut Ram* and *Sri Ram*, bankers of *Delhi*." To some extent that might be evidence against the Defendants, that the first mortgage was binding upon them, and that it included the whole 16 annas, but their Lordships do not think it necessary to place any great reliance upon it.

Now the mortgage having been executed and the debt not being paid, the mortgagee brought an action not against the whole joint family, but against the two members of the joint family who were managers of it, and who had executed the mortgage. The plaint in that suit is not set out in the record before their Lordships, but it has been brought before them during the course of the argument, it having been sent up under the seal of the Court in another appeal, and consequently their Lordships cannot hesitate to accept it as being a correct copy of the plaint in the suit which was instituted by the mortgagee against the two mortgagors under that mortgage. In that plaint the mortgagee claims not only to recover against the mortgagors the amount of the mortgage debt and interest, but asks that he may have execution and be satisfied out of the mortgaged property. He obtained a decree in that suit, and issued an execution, and applied for an attachment of the property. Unfortunately the application for execution of the decree, like the decree itself, is not before their Lordships in this record, but they have it in a manner similar to that in which they have the plaint, and from that application it appears that the mortgagee asked to execute his judgment, not by seizing the right, title, and interest of the two mortgagors under the execution, but that he might be satisfied by seizing and selling that portion of the mortgaged property which was the subject of the suit, and if anything further remained due, that he might levy it upon the separate property of the two Defendants. That application was granted, and their Lordships find, by the certificate of sale, that the whole property was sold. It should be stated that the Plaintiff in this suit was not only

J. C.
1887
DOULUT RAM
v.
MEHR CHAND.

the mortgagee of the property and the Plaintiff in the suit upon the mortgage, but he himself purchased, as he had a right to do, the property under the execution. The certificate of sale says: "It is hereby certified that on the 27th of March, 1879, by means of a sale by public auction, *Lala Doulut Ram*, proprietor of the firm of *Doulut Ram* and *Sri Ram*, was declared to be the purchaser of six houses and nine shops immediately adjoining one another, situated in the *Sukhanand Lane*, and the *Jozri Bazur*, the property of the judgment debtors, for the sum of Rs.44,100, in execution of a decree in this case, and that the said auction sale was formally sanctioned by the Court." It was contended on the part of the Defendants, that although the Plaintiff purchased the property under execution, he was not entitled to the 6-annas shares that belonged to the Defendants, inasmuch as they had not been made parties to the suit upon the mortgage deed, and the learned Judges in the Courts below seem to have acted upon the principle, that inasmuch as that suit was brought against the two mortgagors alone, and not against the Defendants, all that could be sold, and all that was sold, in execution of the decree, was the right, title, and interest of the two mortgagors, namely, their shares in the property, excluding the 6-annas shares which belonged to the Defendants.

It appears to their Lordships that the decree cannot stand. The senior Judge of the Chief Court, Mr. *Barkley*, says: "For the purposes of this appeal it may be assumed, though there is no finding on this point by the Courts below, that the mortgagors were the managers of an ancestral business belonging to a family of which the Defendants, who were minors when the mortgage was effected, were members, and that the mortgage was necessarily entered into, in order to pay the debts of that business. If this were so, the mortgage would be a valid mortgage of the entire property, including the rights of the Defendants, though it was erroneously stated that the mortgagors were the sole owners, and had no co-sharers. It may also be assumed that the property brought to sale was the mortgaged property, and not merely the rights of the judgment debtors therein." Their Lordships think that the learned Judge was correct in making these assumptions. It appears from the record that the Plain-

tiff proposed to prove those facts, but the Defendants rested their defence upon the ground that they had not been made parties to the suit, and consequently that their share in the property had not been sold, and could not be sold under the execution. The Plaintiff's counsel stated: "We propose to call evidence to prove (1) that the Defendants were a joint Hindu family with *Jiwan Mal* and *Lal Chand*"—those were the two mortgagors—"and that the two last-named were the managers of this firm of Defendants. The transactions were carried out in the name of '*Nanak Chand*,' '*Sarup Chand*,'"—the name of the banking firm. Then "(2) the rents of this property were credited in the books of this firm. The expenses of this family were debited in their books; (3) the money we advanced on the mortgage was expended in paying debts, &c., of the joint Hindu family; for his family had dealings with *Kesri Chand Balmokand* when we brought our suit on the mortgage. The Defendants joined with the managers, *Jiwan Mal* and *Lal Chand*, and mortgaged the equity of redemption of the whole property to *Kesri Chand Balmokand*, reciting in that deed that the property was already in mortgage to us." That is the second mortgage, to which allusion has already been made, and upon which their Lordships have not placed much reliance. Then "(5) after we attached the property, *Jiwan Mal*, in virtue of a certificate under sect. 305, tried to sell the whole property per *Ganga Pershad*, auctioneer. The property was twice put up for auction after being advertised, and the Defendants took no steps to make any objections. These sales fell through (6) Subsequently at the sale in execution of decree, *Kesri Chand Balmokand* bid us up to Rs.44,000, and we eventually purchased for Rs.44,000." That is the Plaintiff's purchase at that sale. Then in another part of the record it appears that they also proposed to prove that after the sale had taken place, the Defendants received a portion of the purchase-money, which was more than sufficient to pay off the mortgage, but the Defendants objected, and refused to allow the Plaintiff to go into evidence of those facts. Again, *Jirwan Mal*, in his evidence, stated that the business was managed by *Rattan* and himself; that it was an ancestral business; that there had been no partition; and that the debt for which the

J. C.
1887
DOULUT RAM
v.
MEHR CHAND.

mortgage was executed was due from the business in which the Defendants had a beneficial interest.

Under those circumstances their Lordships think that the learned Judge of the Chief Court was perfectly justified in making the assumptions which he did make, but that he was in error in deciding as he did the question upon the point upon which the Defendants have made their stand, namely, that as they had not been made parties to the action their shares in the property had not been sold.

It appears from the cases that have been cited that notwithstanding the Defendants were not made parties to the suit, still as the suit was brought on the mortgage to recover the mortgaged property, and the Plaintiff in the suit obtained a decree, and executed that decree by seizing the mortgaged property, the question would be whether the mortgage included the interest of all parties, or only the right, title, and interest of the two parties who were made Defendants. In the case cited from volume 5 of the Indian Law Reports, Mr. Justice *Pontifex* in giving his decision says, at page 852: "It has been decided that if the managing member of a family, the other members of which are at the time minors, having authority (the touchstone of which is necessity) mortgages the whole 16 annas of the ancestral property, then, in a suit by the mortgagee, the sale under the decree would pass the whole 16 annas of the mortgaged property, although the mortgagor alone was made Defendant; and the reason for such decision probably is that the 16 annas having been validly mortgaged to the mortgagee, and his remedy being foreclosure or sale, the decree of the Court would affect what was in the parties before it, namely, the mortgagee's right validly acquired to have the whole 16 annas sold."

The present case was first heard before the Assistant Judicial Commissioner, who held the same opinion as that at which the Chief Court arrived. Then it was appealed to the Commissioner, and he came to the same conclusion: but at the time of these decisions the Courts certainly had not before them a recent decision which is reported in the 13th volume of the Indian Law Reports, page 1. There, their Lordships, after very full consideration of the whole case, said: "Their Lordships do not think

that the authority of *Deendyal's* case bound the Court to hold that nothing but *Girdhari's* coparcenary interest passed by the sale. If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. Assuming they have such a right it will avail them nothing unless they can prove that the debt was not such as to justify the sale."

When the Plaintiff applied to be let into possession under the certificate of sale, the Defendants objected. He thereupon brought this suit, and the Defendants had the opportunity of trying whether the mortgage was a valid mortgage which bound the ancestral property. The Plaintiff proposed to prove all the facts that were necessary to make the mortgage valid and binding upon them. The Defendants had the opportunity of trying that question, but they did not wish to try it. They made their stand upon the ground that they had not been made parties to the suit, and that the two mortgagors alone had been sued. But that ground falls from under them. Then when they stood upon that ground, and objected to have the evidence gone into at the proper time for going into it, can they now ask their Lordships to remit the case? Their Lordships at first had some little doubt as to whether the case ought not to be remanded; but considering the evidence of *Jiwan Mal*, and that the Plaintiffs offered to go into the whole of the evidence, and to prove that a portion of the purchase-money was paid over and received by the Defendants, and that the Defendants refused to meet the case upon that ground, their Lordships have come to the conclusion that the case ought not to be remanded, and that the decision of the Chief Court must be reversed, as also the decree of the First Court and that of the Commissioner.

It is therefore necessary that the decree be made which the Chief Court ought to have made, and their Lordships will therefore humbly advise Her Majesty that the decrees of all the Courts below be reversed, and that it be decreed that the Plaintiff is entitled to the 6-annas share for which he sues, and that he

J. C.
1887
DOULUT RAM
v.
MEHR CHAND.

is entitled to recover possession thereof, and further that the Respondents do pay the costs in all the Lower Courts.

The Respondents must pay the costs of this appeal.

Solicitors for Appellant: *Watkins & Latley.*

Solicitors for Respondent: *T. L. Wilson & Co.*

END OF VOL. XIV.

INDEX.

BENGAL SECRETARIAT LIBRARY

ACCOUNTS OF PROCEEDS OF FAMILY JOINT ESTATE: *See* LIMITATION. 1.

ACCUMULATION BY WIDOW: *See* HINDU LAW. 1.

ACT XX. OF 1863, s. 10.] A right of appeal from the decision of a Judge must be given by statute or an equivalent authority.—Act XX. of 1863 having vested in the District Judge a discretionary authority under certain circumstances to fill up a vacancy in the committee of a pagoda:—*Held*, that neither sect. 10 of Act XX. nor sect. 540 of Act X. of 1877 gave a right of appeal from the exercise of such authority.—The question of the High Court's jurisdiction not having been raised before that Court:—*Held*, that the right to raise it had not been waived. There was inherent incompetency in the High Court to deal with the question, before it; and consent could not confer on the High Court a jurisdiction which it never possessed.—*Ledgard* v. *Bull* (Law Rep. 13 Ind. Ap. 134) followed. MEENAKSHI NAIDOO *v.* SUBRAMANIJA SASTRI - - - - 160

ACT I. OF 1877, s. 31.] Suit for reforming or altering a deed of mortgage dismissed, there being no reason to suppose that there was any fraud or deceit on the part of the Defendants, or that there was any mutual mistake of the parties as to the amount which was stated as the sum for which the security was given. MUSSAMAT AMANAT BIBI *v.* LUCHMAN PERSHAD AND NAROTAM DASS [18

2. —— Where a purchaser delayed payment of the purchase-money of immoveable estate, insisting upon the insertion in the conveyance of an absolute warranty of title by the vendor to the property sold:—*Held*, that as a right to such covenant was not shewn, his delay of payment was not excused, and there was no case for decreeing specific performance. BABU BINDESHRI PARSHAD *v.* MAHANT JAIRAM GIR - - 173

ACT X. OF 1877, s. 540: *See* ACT XX. OF 1863.

ACT XV. OF 1877, Arts. 132, 140: *See* LIMITATION.

—— **Art. 91**: *See* LIMITATION.

ADMISSION: *See* LIMITATION.

ADOPTION AFTER ESTATE HAS VESTED IN SON'S WIDOW: *See* HINDU LAW. 2.

AHMEDABAD TALUKDAR ACT (VI. OF 1862), s. 12: *See* GUARDIAN AND WARD.

BENAMI TRANSACTION.] Case in which it was held that an alleged benami transfer operated

BENAMI TRANSACTION—*continued.*

as a valid conveyance; in the absence of sufficient evidence to the contrary.—A wajib-ul-arz ought not to be entered on the record as being an expression of the views of the proprietor of an estate; it should be entered as an official record of local customs. UMAN PARSHAD *v.* GANDARP SINGH 127

BENGAL REGULATION VIII. OF 1819, s. 8, para. 2.] *Held*, that under Regulation VIII. of 1819, sect. 8, para. 2, it is necessary for a sale thereunder that not merely the notice therein referred to should be stuck up at the Collector's and zemindar's kucherees, but that it must also be published in the required manner at the kucheree on the land of the defaulter, meaning on the land which it is sought to sell under the Regulation, or if he has no kucheree, then at the principal town or village on the said land.—Service on the defaulter personally is not sufficient. MAHARANI OF BURDWAN *v.* MURTUNJOY SINGH - - - - - - 30

CHARGE ON SPECIFIC IMMOVEABLE PROPERTY: *See* LIMITATION.

COMMITTEE OF PAGODA: *See* ACT XX. OF 1863.

CONSTRUCTION—Where a razinamah provided that an estate should be divided into certain fractions the division to hold good for ever and to descend from generation to generation, naslan-bad-naslan, and its object appeared to be to set at rest disputes as to the absolute proprietary right therein:—*Held*, that according to the true construction and intention of the instrument the shares were to be held in absolute ownership.—Concurrent findings as to the non-existence of an alleged custom will not be re-examined, unless it be shewn that some principle of evidence had not been properly applied, or that the Courts had been led into error upon written documents. THAKUR HARIHAR BUKSH *v.* THAKUR UMAN PARSHAD - - - - - - 7

CONSTRUCTION OF WILL: *See* LIMITATION.

CONTRACT BY GUARDIAN: *See* GUARDIAN AND WARD.

EXECUTION SALE.] The Plaintiff being mortgagee execution creditor and purchaser at an execution sale of the mortgaged property sued the Defendants for a declaration that his purchase included their shares of the mortgaged property and was not limited to the shares of the mortgagors, who as managing members of the joint

EXECUTION SALE—*continued.*

family to which the Defendants belonged, and of the joint business in which they were interested, had purported to mortgage the interest of the entire family.—The Defendants refused to join issue upon the facts alleged by the Plaintiff shewing that the mortgage validly bound the ancestral estate and business, but pleaded that they were no parties to either the mortgage or the mortgage suit, and that therefore the decree and execution sale, both of which purported to affect the whole estate to which they related, did not affect their interests:—*Held*, that this contention failed, that the case should not be remanded, and that the sale passed the whole estate to which it related. DOULUT RAM *v.* MEHR CHAND - 187

EXECUTION SALE OF HINDU FATHER'S RIGHT AND INTEREST: *See* HINDU LAW. 3, 4.

FRAUD MUST BE PROVED AS LAID.] It is a well-known rule that a charge of fraud must be substantially proved as laid, and that when one kind of fraud has been charged another kind of fraud cannot on failure of proof be substituted for it.—*Montesquieu* v. *Sandys* (18 Ves. 302) approved.—Where the plaint charged a fraudulent concealment of a particular payment from the official assignee, it was unjust and unprecedented for the Court to allow the plaint to be amended after all the evidence had been taken, so as to charge that the payment itself, though known to the official assignee, was a fraud on the Court which he had no power to assent to.—The High Court having granted the relief prayed on a finding that a totally different fraud, not alleged in either the original or amended plaint, has been effected, viz., a fraudulent conspiracy between the parties to the payment and receipt of the money:—*Held*, that such judgment must be reversed. ABDOOL HOOSEIN ZENAIL ABADIN *v.* TURNER - - - - - - 111

GUARDIAN AND WARD.] Where a guardian covenanted for herself and her infant ward to indemnify the purchaser of the ward's estate against any claim by the Government for revenue:—*Held*, that it was beyond the power of the guardian to impose a personal liability on the ward.—*Held*, further, that so far as the guardian purported to charge other estates of the ward to answer the covenant, the charge, whether or not it was *ultra vires*, was void within the terms of sect. 12 of the *Ahmedabad Talukdar Act* (VI. of 1862). WAGHELA RAJSANJI *v.* SHEKH MASLUDIN - 89

2. —— Where a Hindu widow executed kabuliyats as "mother of *S. L. M.*, minor":—*Held*, that she must be considered, in the absence of sufficient evidence to the contrary, as contracting as the mother and guardian of her infant son. It cannot be presumed that she was claiming the estate adversely to her son who was legally entitled; the presumption would rather be that she acted in her lawful capacity. WATSON & Co. *v.* SHAM LAL MITTER - - 178

HINDU LAW.] Where a Hindu widow invests the accumulations from her deceased husband's

HINDU LAW—*continued.*

estate, *primâ facie* it is her intention that they should be regarded as accretions thereto, and not as a separate estate descendible in a different line of succession.—*Isridut Koer* v. *Mussumat Hansbutti Koerain and Others* (Law Rep. 10 Ind. Ap. 150) followed. BABU SHEO LOCHUN SINGH *v.* BABU SAHEB SINGH - - - - - 63

2. —— *Held*, that an adoption with the permission of sapindas by a Hindu widow to her husband, after her husband's estate has vested in his son's widow, is invalid.—*Padma Coomari Debi* v. *Court of Wards* (Law Rep. 8 Ind. Ap. 229) and *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (10 Moore's Ind. Ap. 279) followed. THAYAMMAL *v.* VENKATARAMA AIYAN - - - - - - 67

3. —— Where an execution sale relates to a Mitak-hara joint family estate, and the father alone has been party to the proceedings, and it appears that his mortgage, the suit of the creditor, the decree and the sale certificate all purported to affect his right and interest alone:—*Held*, that, whatever the nature of the debt, only his right and interest were intended to pass.—*Upooroop Tewari* v. *Lalla Bundhjee Suhay* (Ind. L. R. 6 Calc. 749) distinguished. SIMBHUNATH PANDAY *v.* GOLAB SINGH - - 77

4. —— Case in which it was held that what was intended to be sold and bought at an execution sale was the right, title, and interest of the father of a joint Hindu family in the joint estate. Even if there were any ambiguity in one of the sale proclamations the purchaser by ordinary inquiry could easily have learnt the truth, and he was benamee for the execution creditors who were affected with full notice of all the proceedings. PETTACHI CHETTIAR *v.* SANGILI VEERA PANDIA CHINNATHAMBIAR - - - 84

INDIAN EVIDENCE ACT, s. 65, cl. C., s. 74.] *Held*, that the loss or destruction of a document not having been proved, secondary evidence was not admissible under clause C., sect. 65, of the *Indian Evidence Act*.—An anumatri-patra is not a public document within sect. 74, and if it were, the only admissible secondary evidence is a copy certified by a public officer under sect. 76. KHRISHNA KISHORI CHOWDHRANI *v.* KISHORI LAL ROY - - - - - - - 71

IRREGULARITY IN PROCEDURE: *See* LEGAL PRACTITIONERS' ACT XVIII. OF 1879.

ISSUE AS TO IDENTITY OF LAND FORMED: *See* POSSESSION.

JURISDICTION OF HIGH COURT: *See* ACT XX. OF 1863.

LEGAL PRACTITIONERS' ACT XVIII. OF 1879, ss. 14, 40.] Proceedings having been taken before the Commissioner of *Coorg* against a pleader under the *Legal Practitioners Act*, XVIII. of 1879, s. 14, for professional misconduct, a report was made to the Judicial Commissioner that he should be removed from the roll, and the Judicial

LEGAL PRACTITIONERS' ACT XVIII. OF 1879, ss. 4, 40—*continued.*

Commissioner made an order to that effect without hearing the pleader:—A later order was made that the pleader might adduce evidence before the Commissioner. He did so, and the evidence was remitted to the Judicial Commissioner, who confirmed his previous order, again without hearing the pleader:—*Held*, that there had been irregularity under sect. 40 of the Act, that the order must be set aside, and the pleader restored to the roll. *In re* SOUTHEKUL KRISHNA ROW - 154

LIABILITY OF WARD: *See* GUARDIAN AND WARD.

LIMITATION.] Where a judgment of the Judicial Committee in 1879 declared that the Defendant to a suit brought in 1865 held the villages in suit in trust for the joint family to which he belonged, and as a joint family estate governed by the rules of the Mitakshara, and decreed that the Defendant do cause the said villages and the proceeds thereof to be managed and dealt with and applied accordingly:—*Held*, that the Courts below were precluded from holding in subsequent suits that such Defendant held the said villages as an integral impartible estate, according to the rule of primogeniture without the said trust, or from declaring that the Plaintiff was entitled to have his share allotted on partition, to be held by him as sub-proprietor to the Defendant.—One of such subsequent suits brought in 1880, being by the said Plaintiff to determine the amount of wasilat, and to adjust accounts of the profits which had accrued during the pendency of the principal suit, to fix the extent of the share to which he was by agreement with some of his co-sharers entitled, for separate possession by partition of his shares of 113 villages and of all the property which had been acquired by Defendant with the profits of the joint estate and the joint property not included in the former suit, that Defendant should render accounts to the extent of the above-mentioned shares of the profits during his management and for payment:—*Held*, (1) that such suit was not barred by limitation. (2.) That the provisions of the *Oudh Rent Act* (XIX. of 1868), sect. 83, cl. 15, and sect. 106 might apply to the profits of the 113 villages of which the Plaintiff had been recorded as a shareholder, but could not apply to the rest of the joint estate whether moveable or immoveable.—(3.) That the provisions in the Civil Procedure Code applicable to mesne profits did not apply to a suit for partition, or for an account of the proceeds of family estate. PIRTHI PAL SINGH AND UMAN PERSHAD SINGH *v.* THAKUR JEWAHIR SINGH - - - - - - - - 37

2. —— Where a will recited that the father of the Appellant had lent the testator Rs.15,000, and devised certain specific immoveable property to the Appellant with directions to repay the debt therefrom with interest:—*Held*, that this was a charge thereon, and that a suit by the auction purchaser of the creditor's claim to recover the money was governed by art. 132 of Act XV. of 1877, and having been brought within twelve years was not barred. GIRISHCHUNDER MAITI *v.* RANI ANUNDMOYI DEBI - - 137

LIMITATION—*continued.*

3. —— In a suit brought in 1884 by the Appellant and her husband to have a deed executed in 1872 by the husband set aside on the ground of mental incompetence, an unconscionable bargain, and undue influence:—*Held*, that as all the facts relied upon were known to the husband from the date of the deed, and he was not shewn to be a man (however weak in intellect) incapable of having that knowledge, and of allowing it to operate upon his mind, the suit was barred by Act XV. of 1877, art. 91. RANI JANKI KUNWAR *v.* RAJA AJIT SINGH - - 148

4. —— Where a Hindu Plaintiff sued as devisee under a will, his suit is barred by art. 140 of Act XV. of 1877 unless brought within twelve years from the date of the testator's death.—If the case made by the plaint is expressly or implicitly an absolute title under a will, the Plaintiff cannot inconsistently therewith set up a title paramount to that which the Defendant had derived from the testator in his lifetime and by adverse possession. — *Eschenchunder Singh* v. *Shamachurn Bhutto* (11 Moore's Ind. Ap. Ca. 7) followed.—An admission contemplated by sect. 19 is an admission to the Plaintiff or some one claiming under him. MYLAPORE *v.* YEO KAY 168

MITAKSHARA JOINT FAMILY ESTATE: *See* HINDU LAW. 3, 4.

MORTGAGE TO CREDITOR.] A firm being in difficulties executed a mortgage to its creditors. Shortly afterwards some of the creditors named therein sued the firm and obtained decrees.—In a suit brought by other creditors named in the mortgage for sale of the mortgaged property to the extent of their rights, and to recover their debts as due to them thereunder from the Defendants personally.—*Held*, that such suit must be dismissed. It appearing that the deed had never been acted upon, and that, notwithstanding that there was no stipulation to that effect, the intention and agreement were that the deed should not take effect unless all the creditors came in and were bound by it, the same could not be enforced. AJUDHIA PERSHAD *v.* SIDH GOPAL - - - - - - - 21

MORTGAGE BY MANAGING MEMBER OF A HINDU JOINT FAMILY: *See* EXECUTION SALE.

NASLAN-BAD-NASLAN; *See* CONSTRUCTION.

OUDH RENT ACT (XIX. OF 1868), s. 83, cl. 15, s. 106: *See* LIMITATION.

PARTITION: *See* LIMITATION.

POSSESSION.] Upon an issue whether certain chur land was a re-formation on the Plaintiff's land or on the Defendants', evidence was given tending to prove possession thereof by the Plaintiffs for a considerable period prior to the ouster by the Defendants.—The first Court found this issue of identity in favour of the Plaintiffs; the second held that the Plaintiffs had shewn a title by adverse possession; the High Court remanded the case for a decision by the second Court on the issup of identity.—On remand the second

POSSESSION—*continued.*

Court affirmed the finding of the first. In special appeal the High Court held there was no evidence on which such finding could be arrived at, on the ground that evidence of subsequent possession was not receivable as evidence of previous identity:—*Held*, that this was error, possession being established for a period of years, *presumitur retro*. ANANGAMANJARI CHOWDHRANI *v.* TRIPURA SOONDARI CHOWDHRANI - 101

PRACTICE.] Petition of special leave granted from an interlocutory order not appealable under the Code. Stay of execution refused, but an opinion intimated that pending the appeal the decree holder should not be put in possession of the large sums in dispute. MAHARANI INDER KUMARI *v.* MAHARANI JAIPAL KUMARI - 1

2. —— Where a Plaintiff rested his case upon a bond executed by the Defendant and

PRACTICE—*continued.*

upon the recitals contained therein, and the Defendant called for the Plaintiff's books and sought to shew from them that a portion of the moneys covered by the bond had not been advanced:—*Held*, that the books must be admitted *in toto*, and that those items which made in favour of the Plaintiff could not be rejected for want of corroboration. MUSSAMAT RAJESWARI KUAR *v.* RAI BAL KRISHAN - - - 142

SPECIAL LEAVE TO APPEAL FROM INTERLOCUTORY ORDER: *See* PRACTICE.

SPECIFIC PERFORMANCE: *See* ACT I. OF 1877.

WAJIB-UL-ARZ: *See* BENAMI TRANSACTION.

WARRANTY OF TITLE: *See* ACT I. OF 1877.

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